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No. 061284 MAR 21 2007

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In The

Supreme Court of the United States

USF-RED STAR EXPRESS, INC.,

Petitioner,

v.

EDWIN B. TAYLOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in concluding that, in an action under the Americans With Disabilities Act ("ADA"), an instruction to the jury that a "'major life activity' means an activity that an average person can perform with little or no difficulty" was not erroneous and was consistent with this Court's decision in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which ruled that "major life activities" are "those activities that are of central importance to daily life?"

2. Whether the court of appeals erred in concluding that an impairment which would not be sufficiently severe to constitute an actual disability under 42 U.S.C. § 12102(2)(a) would nevertheless constitute a "disability" under 42 U.S.C. § 12102(2)(c) if an employer regards an employee as having such an impairment?

3. Whether an employee is liable under the ADA for regarding an employee as disabled when the employer is factually mistaken about an employee's impairment and the employee or his agent unreasonably fails to correct the employer's mistake and affirmatively fosters the employer's mistaken perception?

4. Whether the court of appeals erred in concluding that the district court did not abuse its discretion by instructing the jury, in an ADA case, that it was undisputed that the employer kept the employee out of work "because of his medical condition" when the employer maintained throughout trial in front of the jury that that was not the case, where both parties agreed that this fact was disputed and that this dispute was the central issue

QUESTIONS PRESENTED FOR REVIEW – Continued

in the case, and where the employer presented evidence that it had kept the employee out of work because doctors had not cleared him to safely perform essential functions of his job?

5. Whether the court of appeals erred in ruling that a supplemental motion for attorneys' fees is timely when filed within a "reasonable" or "logical" time after the entry of judgment when the supplemental motion was not filed within fourteen days "after the entry of judgment" as specified in Federal Rule of Civil Procedure 54(d)(2)(B)?

PARTIES TO THE PROCEEDINGS

The Petitioner is USF-Red Star Express, Inc. ("Red Star"). The Respondent is Edwin Taylor ("Taylor").

RULE 29.6 STATEMENT

USF-Red Star, Inc. is wholly owned by YRC Regional Transportation, a division of Yellow Roadway Corporation. No other publicly held corporation owns any of USF-Red Star's stock.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceedings	iii
Rule 29.6 Statement	iv
Table of Contents	v
Table of Authorities	vii
I. Opinions Below	1
II. Statement of Jurisdiction	1
III. Statutory Provisions Involved	1
IV. Statement of the Case	4
A. Factual Background	6
B. Basis for Federal Jurisdiction	9
C. The Proceedings and Decisions Below	9
V. Reasons for Granting the Petition	13
A. The Third Circuit's Ruling Regarding The Definition Of "Major Life Activity" Conflicts With This Court's Decision In *Toyota* And The Decisions Of Every Circuit That Has Followed *Toyota*	13
B. The Third Circuit's Adoption Of A Different Standard For Establishing A Perceived Disability Than The Standard For Establishing An Actual Disability Conflicts With This Court's Prior Precedent And The Decisions Of Many Of The Circuit Courts	15

TABLE OF CONTENTS – Continued

Page

C. The Court Should Also Grant *Certiorari* To Clarify Whether And Under What Circumstances An Employer Will Have A Reasonable Mistake Defense To A Perceived Disability Claim 19

D. This Court Should Grant *Certiorari* To Clarify That An Employer Does Not Violate The Ada Where It Refuses To Permit An Employee To Work, Not Because Of The Employee's Medical Condition, But Because A Physician Had Not Stated That It Was Safe For The Employee To Return To Work 22

E. The Third Circuit's Construction Of Federal Rule Of Civil Procedure 54(d)(2)(B) Conflicts With The Second Circuit's Interpretation Of The Rule 25

VI. Conclusion 27

TABLE OF AUTHORITIES

Page

CASES

Bernback v. Greco, No. 05-4642, 2007 WL 108293 (3d Cir. Jan. 16, 2007) 26

Breitkreutz v. Cambrex Charles City, Inc., 450 F.3d 780 (8th Cir. 2006) 20, 22

Capobianco v. City of New York, 422 F.3d 47 (2d Cir. 2005) 14

Carruthers v. BSA Advertising, Inc., 357 F.3d 1213 (11th Cir. 2004) 14

Cassimy v. Board of Education of the Rockford Public Schools, District # 205, 461 F.3d 932 (7th Cir. 2006) 14

Collado v. United Parcel Service, Co., 419 F.3d 1143 (11th Cir. 2005) 19, 23

Corley v. Department of Veterans Affairs, No. 05-7137, 2007 WL 512513 (10th Cir. Feb. 20, 2007) 16

Deas v. River West, L.P., 152 F.3d 471 (5th Cir. 1998) 17

Donahue v. Consolidated Rail Corp., 224 F.3d 226 (3d Cir. 2000) 23

EEOC v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001) 17

Equal Employment Opportunity Commission v. J.B. Hunt Transport, Inc., 321 F.3d 69 (2d Cir. 2003) 18

Equal Employment Opportunity Commission v. United Parcel Service, Inc., 306 F.3d 794 (9th Cir. 2002) 14

TABLE OF AUTHORITIES – Continued

Page

Gasser v. D.C., 442 F.3d 758 (D.C. Cir. Mar. 31, 2006) 19

Hall v. Eastman Chemical Co., No. 04-5228, 136 F.App'x 730 (6th Cir. Mar. 28, 2005) 14

Hinojosa v. Jostens Inc., Civ. A. No. 04-10229, 128 F.App'x 364 (5th Cir. April 12, 2005) 19, 24

Kampmier v. Emeritus Corp., 472 F.3d 930 (7th Cir. 2007) 19

Kupstas v. City of Greenwood, 398 F.3d 609 (7th Cir. 2004) 19

Logan v. Marathon Petroleum Co., LLC, Civ. A. No. 05-6434, 196 F.App'x 406 (6th Cir. Sept. 6, 2006) 19

Mancini v. Union Pacific Railroad Co., 98 F.App'x 589 (9th Cir. 2004) 17

McGeshick v. Principi, 357 F.3d 1146 (10th Cir. 2004) 14, 23

Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999) 18

Nese v. Julian Nordic Construction Co., 405 F.3d 638 (7th Cir. 2005) 16

Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002) 17

Pittari v. America Eagle Airlines, Inc., 468 F.3d 1056 (8th Cir. 2006) 20, 22

Rodriguez v. Conagra Grocery Products Co., 436 F.3d 468 (5th Cir. 2006) 23

Rohan v. Networks Presentations LLC, 375 F.3d 266 (4th Cir. 2004) 14, 18

TABLE OF AUTHORITIES – Continued

Page

Roush v. Weastec, Inc., 96 F.3d 840 (6th Cir 1996) 17

Ryan v. Grae & Rybicki, P.C., 135 F.3d 867 (2d Cir. 1998) 17

Scheerer v. Potter, 443 F.3d 916 (7th Cir. 2006) 17

Shannon v. New York City Transportation Authority, 322 F.3d 95 (2d Cir. 2003) 24

Sullivan v. The Neiman Marcus Group, Inc., 358 F.3d 110 (1st Cir. Feb. 13, 2004) 14, 18

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) ..... *passim*

Tancredi v. Metropolitan Life Insurance Co., 378 F.3d 220 (2d Cir. 2004) 26

Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3d Cir. 1999) 20, 21

Tice v. Centre Area Transport Authority, 247 F.3d 506 (3d Cir. 2001) 16, 24, 25

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) ..... *passim*

Walton v. United States Marshals Service, 476 F.3d 723 (9th Cir. 2007) 19

Wenzel v. Mo.-America Water Co., 404 F.3d 1038 (8th Cir. 2005) 19

Weyant v. Okst, 198 F.3d 311 (2d Cir. 1999) 26

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 9

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1331 9

42 U.S.C. § 2000e-5 9

42 U.S.C. § 12101(a)(1) 1, 15

42 U.S.C. § 12102(2) ..... i, 1, 5, 15, 18

42 U.S.C. § 12113(b) 1, 2, 23

42 U.S.C. § 12117 9

Fed. R. Civ. P. 50(a)(1) 2

Fed. R. Civ. P. 54(d)(2)(B) ..... ii, 2, 4, 6, 25, 26

I. OPINIONS BELOW

The opinion of the court of appeals that is the subject of this petition (App. 1-22) is reported at 2006 WL 3749598. The opinion and order of the district court originally denying Red Star's Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial addressed in this petition (App. 23-31) is reported at 2005 WL 555372. The order of the district court granting Taylor's Supplemental Motion for Fees is addressed in this petition. (App. 51-52).

II. STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 21, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS INVOLVED

The relevant provisions of the ADA are 42 U.S.C. §§ 12101(a)(1), 12102(2), and 12113(b), which are set forth below:

42 U.S.C. § 12101(a)(1):

> Some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

42 U.S.C. § 12102(2):

> The term "disability" means, with respect to an individual –

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12113(b):

> The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace

The relevant provisions of the Fed. R. Civ. P. are Rules 50(a)(1), 50(b) and 54(d)(2), which are set forth below:

Rule 50(a)

(a) Judgment as a Matter of Law.

(1) If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

> (A) resolve the issue against the party; and
>
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
>
> (2) **Motion.** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought

and the law and facts that entitle the movant to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

If the court does not grant a motion for judgment as a matter of law made under subdivision (a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment or (if the motion addresses a jury issue not decided by a verdict) no later than 10 days after the jury was discharged. The movant may alternatively request a new trial or join a motion for a new trial under Rule 59.

In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

Rule 54(d)(2)

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

IV. STATEMENT OF THE CASE

This Petition arises out of a dispute between Edwin Taylor ("Taylor") and his former employer, USF-Red Star Express, Inc. ("Red Star"), concerning Taylor's ability to safely perform his job.

Taylor, who worked for Red Star as a combination truck driver and forklift operator, suffered two seizures in March 2001. Under Department of Transportation regulations, the seizures prevented Taylor from driving a truck. Further, Red Star did not permit Taylor to return to work as a forklift operator until a doctor certified that he could operate a forklift safely. Taylor sued Red Star alleging that it had discriminated against him in violation of the ADA because it regarded him as disabled. Taylor's claims were tried to a jury and the jury returned a verdict for Taylor. Red Star moved for judgment as a matter of law or, in the

alternative, for a new trial to remedy prejudicial errors in the jury charge. The district court denied Red Star's motion and awarded Taylor attorneys' fees. Red Star then appealed the district court's judgment and orders to the Third Circuit.

The Third Circuit rejected Red Star's appeal and made several critical rulings that conflict with this Court's prior precedents and with the decisions of several other circuits with respect to ADA jurisprudence and the law regarding petitions for attorneys' fees. With respect to the ADA, the Third Circuit held that a jury instruction defining major life activities as activities "that an average person can perform with little or no difficulty" was not erroneous and was consistent with this Court's decision in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). In *Toyota*, this Court ruled that "major life activities" are "those activities that are of central importance to daily life," not those "that an average person can perform with little or no difficulty." The Third Circuit also effectively applied a different standard to judge perceived disability claims than the standard applied to actual disability claims, holding that a physical impairment that would not have been sufficiently severe to constitute an actual "disability" under 42 U.S.C. § 12102(2)(a) of the ADA was nonetheless a "disability" under 42 U.S.C. § 12102(2)(c) when an employer regarded an employee as having that impairment. The Third Circuit's decision also created confusion regarding the appropriate scope of an important defense to perceived disability claims where an employer is under a mistaken belief as to the nature and severity of an impairment and the employee or his agent affirmatively fosters that mistaken belief. Finally, the Third Circuit wrongly concluded that the district court

committed no error in instructing the jury that it was undisputed that Red Star kept Taylor out of work "because of his medical condition" when Red Star maintained throughout trial in front of the jury that that was not the case, where even Taylor agreed that this fact was disputed and that this dispute was the central issue in the case, and where Red Star maintained and presented evidence that it kept Taylor out of work because doctors had not cleared him to safely perform essential functions of his job. With respect to the attorneys' fee petition, the Third Circuit created a circuit split regarding the appropriate interpretation of Federal Rule of Civil Procedure 54(d)(2)(B).

The Petition, therefore, offers the Court an opportunity to: (1) clarify the definition and application of two critical provisions of the ADA's definition of "disability;" (2) resolve whether there is a reasonable mistake defense to a perceived disability claim, and if so, explain its contours; (3) clarify the discretion of district courts in instructing juries that a critical fact is not disputed when, in fact, it is; and (3) resolve a circuit split reflecting confusion over the proper construction of Federal Rule of Civil Procedure 54(d)(2)(B).

A. Factual Background

Red Star employed Taylor as a combination truck driver/dockworker at its Philadelphia, Pa. trucking terminal. (JA00254 (09/30/2004 Tr. 173:1-10).) In this capacity, Taylor drove 80,000 pound tractor trailers on public roads, and 8,000 pound forklifts on Red Star's crowded and busy dock. (JA001728-JA001729 (Pl. Ex. 39).) In fact, Red Star required every dockworker to be qualified to operate a forklift. (JA00851-JA00852 (10/6/2004 Tr. 38:13-39:2).).

Although forklifts were essential to Red Star's business, they are extremely dangerous if not properly controlled. (JA00132 (9/30/2004 Tr. 51:17-51:18); JA00612 (10/05/2004 Tr. 65:18-65:19); JA01064 (10/06/2004 Tr. 251:1-251:8); JA001500-JA001559 (Def. Ex. 2).) Red Star had experienced a tragic forklift related fatality at one of its other terminals. (JA00900 (10/06/2004 Tr. 87:17-87:20).) Thus, Red Star took its obligation to provide a safe environment for its employees and customers extremely seriously. (JA00330 (10/04/2004 Tr. 25:4-25:14).)

In March 2001, Taylor suffered two seizures at home. (JA001056 (10/06/2004 Tr. 243:22-244:12; JA001561-JA001562 (Def. Ex. 104).) The seizures rendered him unconscious and unable to control himself for their duration. After his second seizure, Taylor was hospitalized for two days and two nights. (JA00789 (10/05/2004 Tr. 241:15-241:22).) When he was discharged, Taylor's doctor instructed him not to drive or operate hazardous machinery. (JA001561-JA001562 (Def. Ex. 104).) Taylor returned to work and drove a forklift for three days before informing Red Star that he had suffered seizures and could not drive a truck as a result. (JA00820-JA00822 (10/06/2004 Tr. 7:3-9:18).) Given the obvious safety concerns, Red Star informed Taylor that he could not return to work until a doctor cleared him to operate a forklift safely. (JA00822-JA00823 (10/06/2004 Tr. 9:19-10:5).)

Over the next 19 months, Taylor sought the required medical clearance from six different doctors.[1] Taylor's first

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[1] (JA00763-JA00764 (10/05/2004 Tr. 215:1-216:25); JA001730 (Def. Ex. 2); JA00766 (10/05/2004 Tr. 218:4-218:22); JA001595-JA001599 (Pl. Ex. 31); JA00630-JA00632 (10/05/2004 Tr. 83:1-85:16); JA00976-JA00977 (10/06/2004 Tr. 163:21-164:12); JA001099-JA001102

(Continued on following page)

two neurologists and his family doctor informed Red Star that he could not operate a forklift and could not drive a truck for at least a year.[2] Later, Taylor submitted medical opinions to Red Star that indicated that he could work on a dock, but made no mention of operating a forklift. (JA001665 (Pl. Ex. 45).) Other medical opinions conflicted with the earlier opinions and/or were based on wrong information. (JA00763-JA00764 (10/05/2004 Tr. 215:1-216:25).)

While he was seeking medical clearance to return to work, Taylor promoted a misperception of his medical condition to further his litigation strategy. Specifically, Taylor filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in which he falsely stated, under oath, that he had been "diagnosed with epilepsy" and that Red Star was discriminating against him because of his "epilepsy." (JA001459 (Def. Ex. 6).) These sworn allegations were perjured, for Taylor admitted that he had never been diagnosed with epilepsy and had never believed that he had epilepsy. (JA001086-JA001088 (10/07/2004 Tr. 9:8-11:20); JA001071 (10/06/2004 Tr. 258:9-258:14).) Taylor also wrote to Red Star seeking an accommodation for his "epilepsy." (JA001455-JA001457 (Def. Ex. 4).) Taylor made this representation, too, knowing that it

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(10/07/2004 Tr. 22:2-25:25; JA001564-JA001566 (Pl. Ex. 9); JA001665 (Pl. Ex. 45); JA001600-JA001606 (Pl. Ex. 38); JA001664 (Pl. Ex. 44); JA001468 (Def. Ex. 40); JA001560 (Def. Ex. 99); JA00096 (09/30/2004 Tr. 15:3-15:25); JA001675 (Pl. Ex. 58); JA001471-JA001472 (Def. Ex. 43); JA00454 (10/04/2004 Tr. 149:4-149:25).)

[2] (JA001595-JA001599 (Pl. Ex. 31); JA001099-JA001102 (10/07/2004 Tr. 22:2-25:25); JA001564-JA001566 (Pl. Ex. 9); JA001665 (Pl. Ex. 45); JA001600-JA001606 (Pl. Ex. 38).)

was false. (JA001086-JA001088 (10/07/2004 Tr. 9:8-11:20); JA001071 (10/06/2004 Tr. 258:9-258:14).)

As soon as the doctors stated that Taylor could safely operate a truck and a forklift, Red Star reinstated him. (JA001676-JA001678 (Pl. Ex. 61); JA001473-JA001474 (Def. Ex. 84); JA001475 (Def. Ex. 85).)

B. Basis for Federal Jurisdiction

The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this matter pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 12117, and 42 U.S.C. § 2000e-5. The United States Court of Appeals for the Third Circuit had jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

C. The Proceedings and Decisions Below

Taylor sued Red Star claiming that it had violated the ADA by keeping him out of work based on its perception that he was disabled. Red Star responded that it had refused to allow Taylor to return to work not because it regarded him as disabled, but rather because it had legitimate safety concerns and because Taylor's doctors had not cleared him to safely drive a truck or a forklift. Red Star moved for judgment as a matter of law during the trial. The district court reserved judgment on Red Star's motion and submitted the case to the jury.

Over Red Star's objection, the district court charged the jury that: (1) "you need not decide whether USF-Red Star prevented Mr. Taylor from returning to work because of his medical condition. There is no dispute as to this fact," (App. 7-8) and (2) "the phrase 'major life activity'

means an activity that an average person can perform with little or no difficulty." (App. 7-8). Based on these erroneous charges, the jury found for Taylor on his disability discrimination claim.[3] The district court entered judgment for Taylor and Red Star renewed its motion for judgment as a matter of law and moved in the alternative for a new trial based on errors in the jury charge (the "Rule 50 Motion"). Taylor moved for attorneys' fees and later filed a supplemental motion seeking additional attorneys' fees. The district court denied Red Star's Rule 50 Motion and granted Taylor's motions for attorneys' fees.

Red Star timely appealed the district court's judgment and orders denying Red Star's Rule 50 Motion and granting Taylor's motions for attorneys' fees. Red Star argued that the court of appeals should have reversed the district court's orders because: (1) the district court erred in instructing the jury that a "major life activity" is "an activity that an average person can perform with little or no difficulty;" (2) the district court erred in instructing the jury that it was undisputed that Red Star kept Taylor out of work "because of his medical condition" when both parties agreed that this fact was the central issue in the case and that it was disputed; (3) Red Star was entitled to judgment as a matter of law because Taylor failed to adduce evidence sufficient to establish that Red Star regarded him as disabled; (4) Red Star was entitled to judgment as a matter of law because Taylor had unreasonably failed to correct, and actually promoted, any such misperception, and (5) Taylor's supplemental motion for

[3] Taylor also filed an ADA retaliation claim. The jury found in Red Star's favor on this claim, and it is not at issue here.

attorneys' fees was untimely. The court of appeals, however, affirmed the district court's orders.

The Third Circuit found that the district court's jury charges had not been erroneous. The court of appeals rejected Red Star's argument that the district court should have instructed the jury, consistent with this Court's decision in *Toyota,* 534 U.S. at 197, that a major life activity is "an activity of central importance to daily life," as opposed to the district court's own definition of the term as being "an activity that an average person can perform with little or no difficulty." (App. at 8-9). The court of appeals reasoned that, because the district court had accurately defined the major life activity of working, its jury instruction was not erroneous and was "consistent" with this Court's decisions in *Toyota* and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). (App. 8-9).[4] The Third Circuit also found that the district court did not abuse its discretion in instructing the jury that there was no dispute of fact regarding whether Red Star prevented Mr. Taylor from returning to work because of his medical condition. (App. 6-7).

In addition, the court of appeals rejected Red Star's argument that no reasonable jury could have found that Red Star regarded Taylor as disabled because Taylor had presented no evidence sufficient to establish that Red Star perceived him as suffering from an impairment that substantially limited a major life activity. The Third Circuit found that Taylor had presented sufficient evidence to

[4] The court of appeals also distinguished *Toyota* from other cases that do not address the "major life activity of performing manual tasks." (*Id.* at 8).

establish a "regarded as" claim because the record contained evidence that Red Star thought that Taylor was "'seizure prone' so that he '*might* have another seizure and be a danger to the public' . . . , and that 'no matter what he was doing [he] *could* be a threat to himself [and] others." (*Id.* at App. 9-10 (emphasis added).) That evidence, however, would be insufficient to establish an actual "disability" within the meaning of the ADA as a matter of law, and was not legally sufficient to establish that Red Star regarded Taylor as having an actual disability.

The Third Circuit also rejected Red Star's argument that it was entitled to judgment as a matter of law because Taylor unreasonably failed to correct, and actively fostered any misperception Red Star had concerning his condition. (App. 11-12). The court of appeals rejected Red Star's argument and found that Red Star was not entitled to the defense because "there was evidence [that] Red Star's perception that Taylor had a serious epileptic condition preventing him from working in any capacity on Red Star's dock was not based on information from Taylor, but on the assessments of doctors reporting to Red Star." (App. 12).

Finally, the court of appeals rejected Red Star's challenge to Taylor's supplemental motion for attorneys' fees, holding that the supplemental motion was timely "because its timing was logical, despite the fact that it was filed more than fourteen days after any entry of judgment." (App. 20-22).

V. REASONS FOR GRANTING THE PETITION

A. The Third Circuit's Ruling Regarding The Definition Of "Major Life Activity" Conflicts With This Court's Decision In *Toyota* And The Decisions Of Every Circuit That Has Followed *Toyota*.

The Court should grant the Petition because the Third Circuit's holding conflicts with this Court's precedent on the proper definition of a critical provision of the ADA. The district court instructed the jury in this case that "the phrase 'major life activity' means an activity that an average person can perform with little or no difficulty." (App. 7). The Third Circuit ruled that this definition of "major life activity" was "consistent with *Toyota*, *Sutton*, our precedent, and the EEOC regulations." (App. 9). In actuality, however, this holding conflicts directly with this Court's decision in *Toyota* and the decisions of every other circuit that has followed *Toyota*'s definition of "major life activity." Moreover, the Third Circuit's unwarranted adoption of this new, less stringent definition will radically increase the number of individuals fitting the definition of "disabled" under the ADA.

In *Toyota*, this Court ruled that the word "'[m]ajor' in the phrase 'major life activities' means important. 'Major life activities' thus refers to *those activities that are of central importance to daily life*." *Toyota*, 534 U.S. at 197- (citations omitted, emphasis added). Plainly, not all activities that an average person can perform "with little or no difficulty," (App. 7), are "of central importance to daily life." *Toyota*, 534 U.S. at 197. The Third Circuit's holding, therefore, is irreconcilable with this Court's

decision in *Toyota*.[5] Its holding also is inconsistent with the decisions of the many other circuits that have followed this Court's definition of a "major life activity." *See Sullivan v. The Neiman Marcus Group, Inc.*, 358 F.3d 110, 115 (1st Cir. Feb. 13, 2004); *Capobianco v. City of N.Y.*, 422 F.3d 47, 56 (2d Cir. 2005); *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 274 (4th Cir. 2004); *Hall v. Eastman Chem. Co.*, No. 04-5228, 136 F.App'x 730, 732 (6th Cir. Mar. 28, 2005) (unpublished opinion); *Cassimy v. Bd. of Educ. of the Rockford Public Sch., Dist. # 205*, 461 F.3d 932, 936 (7th Cir. 2006); *Equal Employment Opportunity Comm'n v. United Parcel Serv., Inc.*, 306 F.3d 794 (9th Cir. 2002); *McGeshick v. Principi*, 357 F.3d 1146, 1050 (10th Cir. 2004); *Carruthers v. BSA Adver., Inc.*, 357 F.3d 1213, 1216-17 (11th Cir. 2004).

Moreover, the Court should grant Red Star's Petition because the Third Circuit's endorsement of a new definition of "major life activities" would dramatically increase the number of individuals covered by the ADA and significantly reduce plaintiffs' burden of proving disability discrimination claims. There are certainly many more individuals who have impairments that substantially limit an activity that "an average person can perform

[5] The Third Circuit reasoned that the district court's jury instruction on the definition of "major life activity" was consistent with this Court's decision in *Toyota* because the district court properly instructed the jury on the standard for proving a *substantial limitation* in the major life activity of working that this Court adopted in *Sutton*, 527 U.S. 471. (App. 8-9). That the district court may have applied the appropriate standard for proving a substantial limitation in one specific major life activity, however, cannot harmonize its erroneous definition of the distinct legal concept of a "major life activity" with this Court's definition in *Toyota*.

with little or no difficulty," than there are individuals who have impairments that substantially limit an activity of "central importance to daily life." If Congress had intended such an expansive definition of disability, however, it is inconceivable that it would have found that only "some 43,000,000 Americans have one or more physical or mental disabilities." *Toyota*, 534 U.S. at 691 (quoting 42 U.S.C. § 12101(a)(1)). Moreover, the Third Circuit's new, less rigorous definition of "major life activities" effectively reduces a plaintiff's burden of proving that he or she is "disabled" within the meaning of the statute. This result is particularly unwarranted given this Court's instruction that the terms "substantially limited" and "major life activity" must be interpreted strictly to create a "demanding standard for qualifying as disabled." *Toyota*, 534 U.S. at 197.

B. The Third Circuit's Adoption Of A Different Standard For Establishing A Perceived Disability Than The Standard For Establishing An Actual Disability Conflicts With This Court's Prior Precedent And The Decisions Of Many Of The Circuit Courts.

The Court should also grant the Petition because the Third Circuit's holding conflicts with this Court's construction of the statutory provisions defining actual and perceived disabilities. In ruling on this case, the Third Circuit effectively adopted a different, more lenient standard for proving a perceived disability under 42 U.S.C. § 12102(2)(c) than the standard for proving an actual disability under 42 U.S.C. § 12102(2)(a). The Third Circuit held that evidence that Red Star believed that "Taylor was 'seizure prone' so that he 'might have another seizure and be a danger to the

public' and that 'no matter what he was doing [he] could be a threat to himself [and] others'" was sufficient to establish that Red Star regarded Taylor as disabled. (App. 9-11 (citations omitted).) But if Taylor were actually "seizure prone" so that "he *might* have another seizure and be a danger to the public" and that "no matter what he was doing [he] *could* be a threat to himself and others," this evidence alone would not render him "disabled" since the evidence is insufficient as a matter of law to prove that he was substantially limited in a major life activity.

Evidence that a plaintiff is "seizure prone" is not sufficient to establish that he is substantially limited in a major life activity. Indeed:

> [i]t is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of impairment. Instead, the ADA requires those "claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial."

Toyota, 534 U.S. at 197-98; *see also, e.g.*, *Corley v. Dep't of Veterans Affairs*, No. 05-7137, 2007 WL 512513 at *4 (10th Cir. Feb. 20, 2007) (unpublished opinion) (holding that proof that plaintiff has a "seizure disorder" alone is insufficient to prove a disability); *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 513 n.5 (3d Cir. 2001) ("a particular diagnosis, no matter how severe (or severe sounding to the layperson), standing alone is not sufficient to establish 'disability.'"); *Nese v. Julian Nordic Constr. Co.*, 405 F.3d 638, 642-43 (7th Cir. 2005) (noting that "a medical condition, however, by itself does not constitute a disability" and finding that the fact that defendant knew plaintiff suffered

from seizures was not sufficient to prove a perceived disability); *Deas v. River West, L.P.*, 152 F.3d 471, 478-79 (5th Cir. 1998) (declining to find that "seizures" are a *per se* disability); *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 353 (4th Cir. 2001) (noting that epilepsy is not a *per se* disability, and finding that plaintiff was not disabled because her seizures did not substantially limit a major life activity); *Mancini v. Union Pac. R.R. Co.*, 98 F.App'x 589, 590 (9th Cir. 2004) (unpublished opinion) (recognizing that "epilepsy does not render an individual disabled per se for purposes of the ADA") (internal citations omitted).

Likewise, evidence that a plaintiff "might" or "could" have a seizure and thus be a danger to himself or others is not sufficient to establish that the plaintiff is substantially limited in a major life activity. *See Sutton*, 527 U.S. at 482 (a person must "be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability."); *Scheerer v. Potter*, 443 F.3d 916, 922 (7th Cir. 2006) (rejecting alleged proof of substantial limitation that would require "courts to speculate and predict" the likely impact of an impairment); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8th Cir. 2002) (finding evidence that plaintiff "*could*" experience adverse symptoms that "*would*" substantially limit a major life activity insufficient to establish that plaintiff was disabled); *Sara Lee*, 237 F.3d at 353 (noting that "to hold that a person is disabled whenever that individual suffers from an occasional manifestation of an illness would expand the contours of the ADA beyond all bounds."); *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 871 (2d Cir. 1998) (finding impairment was not substantially limiting because it was only symptomatic at certain times and asymptomatic for long periods of time); *Roush v. Weastec, Inc.*, 96 F.3d 840,

844 (6th Cir. 1996) (finding that the "mere possibility that [symptoms] will recur . . . is not sufficient to establish that [a] condition is substantially limiting.").

In finding that this evidence was sufficient to establish a perceived disability claim, the Third Circuit adopted a different standard for proving a "regarded as" disability claim under 42 U.S.C. § 12102(2)(c) than the standard applicable to prove an actual disability under 42 U.S.C. § 12102(2)(a). This new double-standard is at odds with the plain statutory language, *compare* 42 U.S.C. § 12102(2)(a) *with* § 12102(2)(c), and inconsistent with this Court's holding that both actual and perceived disability claims depend on proof of the same thing – a substantial limitation of a major life activity. In *Sutton*, this Court explained that, to prove an actual disability, a plaintiff must establish that he possesses an impairment "that substantially limits [him] in one or more major life activities;" while, to prove a perceived disability, a plaintiff must show that "(1) a covered entity mistakenly believes that [he] has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton*, 527 U.S. at 481, 490; *see also Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521-22 (1999). The Third Circuit's use of two different standards also conflicts with many of its sister circuits' decisions that proof of a perceived disability requires proof that the employer believes the employee is substantially limited in a major life activity. *See, e.g.*, *Sullivan*, 358 F.3d at 117-18; *Equal Employment Opportunity Comm'n., v. J.B. Hunt Transp., Inc.*, 321 F.3d 69, 74 (2d Cir. 2003); *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 277 (4th Cir. 2004);

Hinojosa v. Jostens Inc., No. 04-10229, 128 F.App'x 364, 367-68 (5th Cir. April 12, 2005) (unpublished opinion); *Logan v. Marathon Petroleum Co., LLC*, No. 05-6434, 196 F.App'x 406, 409 (6th Cir. Sept. 6, 2006) (unpublished opinion); *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 938 (7th Cir. 2007); *Kupstas v. City of Greenwood*, 398 F.3d 609, 612-13 (7th Cir. 2004); *Wenzel v. Mo.-Am. Water Co.*, 404 F.3d 1038, 1040-41 (8th Cir. 2005); *Walton v. U.S. Marshals Serv.*, 476 F.3d 723, 727-28 (9th Cir. 2007); *Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1156-57 (11th Cir. 2005); *Gasser v. D.C.*, 442 F.3d 758, 763 (D.C. Cir. Mar. 31, 2006).

This Court should grant the Petition to resolve this split, clarify the definition of disability, and explain the quantum of evidence necessary to prove a perceived disability claim.

C. The Court Should Also Grant *Certiorari* To Clarify Whether And Under What Circumstances An Employer Will Have A Reasonable Mistake Defense To A Perceived Disability Claim.

At least two circuits have crafted narrow exceptions to perceived disability claims based on this Court's decision in *Sutton*. The Court should grant the Petition to clarify the existence and boundaries of these defenses.

In *Sutton*, this Court explained that employer misperceptions are central to the perceived disability prong of the ADA. To prove a regarded as disability, "it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has

a substantially limiting impairment when, in fact, the impairment is not so limiting." *Sutton*, 527 U.S. at 489. The Court further noted that these "misperceptions often 'resul[t] from stereotypic assumptions not truly indicative of . . . individual ability'" and that, in the ADA, "'Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.'" *Id.* Building on this foundation, the Eighth Circuit has ruled that work restrictions "based upon the recommendations of physicians [are not] based on myths or stereotypes about the disabled and [do] not establish a perception of disability." *Breitkreutz v. Cambrex Charles City, Inc.*, 450 F.3d 780, 784 (8th Cir. 2006); *Pittari v. Am. Eagle Airlines, Inc.*, 468 F.3d 1056, 1063 (8th Cir. 2006.)

Relying on the same logic, the Third Circuit adopted a "reasonable mistake defense" to liability for perceived disability claims in *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 193 (3d Cir. 1999). In *Pathmark Stores*, the Third Circuit explained the defense as follows:

> [i]f an employer regards a plaintiff as disabled based on a mistake in an individualized determination of the employee's actual condition rather than on a belief about the effects of the kind of impairment the employer regarded the employee as having, then the employer will have a defense if the employee unreasonably failed to inform the employer of the actual situation.

Id. The defense applies both when the employee is responsible for the mistake, and when the employee's agent is responsible for the mistake. *Id.* at 193 (employer is not liable under ADA if "employee or his agent is responsible for the mistake"). In the instant case, however, the Third

Circuit has signaled a substantial pairing-back of the reasonable mistake defense.

Red Star clearly established the reasonable mistake defense as originally set forth in *Pathmark Stores*, 177 F.3d at 193. Red Star engaged in an extensive effort to make an individualized determination of Taylor's actual condition. Indeed, Red Star evaluated numerous medical opinions from six different doctors regarding Taylor's medical condition and consistently sought additional information about Taylor's functional capabilities rather than his diagnosis. Taylor, on the other hand, affirmatively misrepresented his medical condition to the EEOC and Red Star under oath and in writing. Specifically, Taylor filed a charge of discrimination with the EEOC in which he averred under oath that he had been "diagnosed with epilepsy" and that Red Star was discriminating against him because of his "epilepsy." (JA001459 (Def. Ex. 6).) When he filed the charge, however, Taylor knew he had not been diagnosed with epilepsy and did not believe that he had epilepsy. (JA001086-JA001088 (10/07/2004 Tr. 9:8-11:20); JA001071 (10/06/2004 Tr. 258:9-258:14).) Similarly, Taylor wrote to Red Star seeking an accommodation for "his epilepsy." (JA001455-JA001457 (Def. Ex. 4).) Again, at the time, Taylor knew he did not have epilepsy and did not believe that he had epilepsy. (JA001086-JA001088 (10/07/2004 Tr. 9:8-11:20); JA001071 (10/06/2004 Tr. 258:9-258:14).) Taylor then filed a perceived disability claim against Red Star predicated on the notion that Red Star had regarded Taylor as an epileptic. (App. 4).

Nonetheless, the Third Circuit found that Red Star could not take advantage of the reasonable mistake defense because "there was evidence [that] Red Star's perception that Taylor had a serious epileptic condition

preventing him from working in any capacity on Red Star's dock was not based on information from Taylor, but on the assessments of doctors reporting to Red Star." (App. 12). This rationale for limiting the reasonable mistake defense, however, conflicts with the Eighth Circuit's holdings that restrictions based on the recommendations of doctors are not based on stereotypic attitudes, and thus, do not establish a perception of disability. *Breitkreutz*, 450 F.3d at 784; *Pittari*, 468 F.3d at 1063. This Court, therefore, should grant the Petition to clarify whether a reasonable mistake defense to a regarded as disability claim exists, and if so, to identify its boundaries.

D. This Court Should Grant *Certiorari* To Clarify That An Employer Does Not Violate The Ada Where It Refuses To Permit An Employee To Work, Not Because Of The Employee's Medical Condition, But Because A Physician Had Not Stated That It Was Safe For The Employee To Return To Work.

Red Star maintained throughout the litigation, including at trial before the jury, that Taylor was not permitted to return to work because a physician did not clear him to return to work to operate a forklift, and not because of his medical condition. But, the district court instructed the jury that it was undisputed that Red Star kept Taylor out of work "because of his medical condition." (App. 5-6). The Third Circuit concluded that an employer declining to permit an employee to return to work because a physician has not cleared him to do so, is the same as declining to return the employee to work because of his medical condition. (*Id.*) That conclusion is at odds, not only

with previously existing precedent in the Third Circuit, but also with the law in other circuits.

The court of appeals' decision that a jury instruction is not prejudicial that equates a "medical condition" with an employer's decision to keep an employee out of work until a doctor clears the employee to safely perform a dangerous and essential function of his job eliminates an important defense available to employers under the ADA. There is no question that an employer is not liable under the ADA when it justifies its employment action by establishing that the employee would "pose a direct threat to the health or safety of other individuals in the workplace." *See* 42 U.S.C. § 12113(b); *see also Rodriguez v. Conagra Grocery Prod. Co.*, 436 F.3d 468, 474 (5th Cir. 2006) (recognizing that "even if an employer discriminates against a 'qualified individual with a disability,' that employer can avoid liability by asserting a legitimate justification for its action, including that the plaintiff, if hired, would "pose a direct threat to the health or safety of other individuals in the workplace."); *Collado*, 419 F.3d at 1160 (recognizing that "[t]here are serious public policy problems with interpreting and applying the law in a way that would discourage employers from enforcing measures that safeguard the safety of the public, regardless of their motivation for doing so."); *McGeshick*, 357 F.3d at 1151 (recognizing that the ADA does not require "employers to put themselves or their employees at risk to accommodate an individual whose limitations might be dangerous on the job."); *Donahue v. Consol. Rail Corp.*, 224 F.3d 226, 231 (3d Cir. 2000) (finding that an employer may prevent a plaintiff from returning to work based on a legitimate safety concern).

Equating an employee's "medical condition" with an employer's refusal to allow an employee to come back to work without a clear physicians' opinion regarding the employee's ability to safely perform an essential and dangerous function of his job after the employee has informed the employer that he has an unclear medical restriction related to that function of his job completely frustrates the utility of this defense. Moreover, if such an instruction is uniformly permitted, then employers will be discouraged from ensuring the safety of their employees.

The court of appeal's decision is in conflict with its own previously existing precedent, as well as cases in the Second and Fifth Circuits that have recognized that an employer may lawfully seek a medical opinion to determine the extent of an employee's impairment without regarding the employee as being disabled. *See, e.g., Tice*, 247 F.3d at 515 (an employer may lawfully seek a medical determination of the extent of the plaintiff's impairment without regarding him as disabled); *Hinojosa*, 128 F.App'x at 368 (recognizing "fact that [employer] inquired into [employee's] capability to perform his duties does not establish that [the employer] considered [the employee] substantially limited in a major life activity."); *Shannon v. N.Y. City Trans. Auth.*, 322 F.3d 95, 99 & n.1 (2d Cir. 2003) (stating that it was a stretch for employee to base regarded as claim on evidence that employer required him to submit to medical examination without deciding the issue; "it is an open question, however, whether an employer's testing of a particular capacity can alone support an inference that the employee is regarded as suffering from a deficit in the capacity tested.") (*citing Tice*, 247 F.3d at 508-09).

As the Third Circuit explained in *Tice*,

> a request for an IME that complies with the statutory restrictions will never, in the absence of other evidence, be sufficient to demonstrate that an employer "regarded" the employee as substantially limited in a major life activity ... A request for such an appropriately tailored examination only establishes that the employer harbors *doubts* (not certainties) with respect to an employee's ability to perform a *particular* job. Doubts alone do not demonstrate that the employee was held in any particular regard.

Id. at 515 (emphasis in original). Because the court of appeals instructed the jury that Red Star did not permit Taylor to work because of a medical condition, the jury was unable to find that Red Star was not liable because it merely questioned Taylor's medical qualifications to drive a forklift and required a medical certification to answer its question. Indeed, prior to this case, the Third Circuit actually, and correctly, held that a request for medical clearance is "never sufficient to demonstrate that an employer" regarded the employee as disabled. *Id.*

E. The Third Circuit's Construction Of Federal Rule Of Civil Procedure 54(d)(2)(B) Conflicts With The Second Circuit's Interpretation Of The Rule.

The Court should also grant the Petition to resolve a circuit split regarding the proper interpretation of Federal Rule of Civil Procedure 54(d)(2)(B). The Federal Rules require a motion for attorneys' fees to be filed "no later than 14 days after entry of judgment" unless "otherwise provided by statute or order of court." Fed. R. Civ. P. 54(d)(2)(B).

Consistent with the plain text of the Rule, the Second Circuit has held that both initial and supplemental fee petitions are governed by the fourteen day period set forth in Rule 54(d)(2)(B). *See Weyant v. Okst*, 198 F.3d 311, 315 (2d Cir. 1999) (noting that "our interpretation of the commencement of the 14-day period set by Rule 54(d)(2)(B) is applicable not only to supplemental [fee petitions] . . . but also to initial fee applications"). Furthermore, the Second Circuit has ruled that, once the fourteen day period has run, Rule 54's filing deadline can only be extended upon a finding of excusable neglect under Rule 6(b)(2). *Tancredi v. Metro. Life. Ins. Co.*, 378 F.3d 220, 227-28 (2d Cir. 2004). By contrast, in this case, the Third Circuit suggested that the timeliness of initial and supplemental fee petitions ought to be treated differently under Rule 54(d)(2)(B), and held that a supplemental fee petition filed more than fourteen days after the entry of judgment is nonetheless timely if it was filed within a "logical" time. (App. 21-22). To add to the confusion, moreover, a different panel of the Third Circuit has followed the Second Circuit's decision in *Weyant* and held that a supplemental fee petition is untimely unless it is filed within fourteen days of the entry of judgment. *Bernback v. Greco*, No. 05-4642, 2007 WL 108293 at *2-3 (3d Cir. Jan. 16, 2007) (unreported opinion). The Court should grant the Petition to resolve this circuit split reflecting confusion regarding the proper interpretation of Rule 54(d)(2)(B).

VI. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: March 21, 2007

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APPENDIX TABLE OF CONTENTS

Document Description	**Page**
December 21, 2006	App. 1 – App. 22
March 8, 2005 Order	App. 23 – App. 30
March 8, 2005 Order	App. 31
March 8, 2005 Order and Memorandum	App. 32 – App. 45
April 26, 2005 Order	App. 46 – App. 50
June 8, 2005 Order	App. 51 – App. 52
June 8, 2005 Order	App. 53

2006 WL 3749598

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-2063, 05-2487, 05-2566 & 05-0381

EDWIN TAYLOR,

Appellant at No. 05-2566

v.

USF-RED STAR EXPRESS, INC.,

Appellant at Nos. 05-2063,
05-2487 & 05-3081

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 03-cv-2216
(Honorable Clarence C. Newcomer)

Submitted Pursuant to Third Circuit LAR 34.1(a)
November 6, 2006
Before: SCIRICA, *Chief Judge*, BARRY
and ALDISERT, *Circuit Judges*

(Filed: December 21, 2006)

OPINION OF THE COURT

SCIRICA, *Chief Judge.*

USF-Red Star, Inc. appeals the District Court's entry of final judgment in favor of Edwin B. Taylor in a discrimination suit brought under the Americans with Disabilities Act, 42 U.S.C. §§ 12,101-213 (2000), as well as the denial of its post-trial motion for judgment as a matter of law or a new trial. Red Star also appeals the District Court's award of attorney's fees as legally erroneous and an abuse of discretion. Taylor cross-appeals the District Court's reduction of certain hours in his attorney's fees award as an abuse of discretion. We will affirm.

I. Facts and Procedural History

Red Star employed Taylor as a combination truck driver/dockworker at its Philadelphia terminal. On March 1, 2001, Taylor was hospitalized after suffering two seizures, possibly attributable to use of the nutritional supplement creatine, that temporarily rendered him unconscious and unable to control himself. His treating physician, Dr. Eduardo Enriquez, instructed him not to drive or operate hazardous machinery. A neurologist, Dr. Karen Scardigli, on March 14, 2001, interpreted Taylor's MRI as consistent with a seizure disorder. Taylor returned to work and drove a forklift on March 12, 2001, but told Red Star terminal manager Barry Saylor he was unable to drive a truck. On March 15, 2001, Taylor informed Saylor of his seizures and, Red Star contends, told him he had been diagnosed with "infantile epilepsy." Saylor told Taylor not to return to work until Red Star received information from his doctor that he could safely operate a forklift.

Over the next eighteen months, several physicians evaluated Taylor's condition and ability to operate a

forklift. Dr. Scardigli initially told Red Star around March 20, 2001, that Taylor could return to operating a forklift, but reversed herself on March 29, 2001, after speaking to Dr. Joel Mascaro, a physician employed by NovaCare who performed frequent employment physicals for Red Star. On April 25, 2001, a second neurologist sought out by Taylor, Dr. David Roby, diagnosed Taylor as likely to remain seizure-free and able to return to gainful employment (though not to driving a truck). On May 7, 2001, Taylor's family physician, Dr. Jay Glickman, also informed Red Star that Taylor should remain seizure-free, but could not drive a truck until he remained so for a year. On March 12, 2002, Taylor sent Red Star a February 6, 2002, letter from Dr. Glickman stating the same, as well as a February 6, 2002, letter from a medical examiner releasing Taylor to drive a commercial vehicle. On May 2, 2002, a NovaCare physician's assistant examined Taylor at Red Star's request and issued a medical examiner's certificate releasing Taylor to drive a commercial vehicle, but was reversed by Dr. Mascaro on May 6, 2002.

On July 2, 2002, Dr. Roby responded to a request for clarification by Dr. Mascaro with a letter stating it was "possible" Taylor could return to work in some capacity in which seizures were not an issue. Later that month, Taylor sought an evaluation from another physician, Dr. Hillard Sharf, who wrote a letter to an EEOC investigator stating he saw no problem in Taylor's driving a forklift or truck. Dr. Roby, Dr. Sharf, and Dr. Gordon Manin (Dr. Mascaro's successor at NovaCare) agreed that Taylor should be evaluated at Thomas Jefferson Epilepsy Center. On October 3, 2002, a neurologist there, Dr. Michael Sperling, evaluated Taylor and concluded he was not at any substantially greater risk of seizures than other

members of the general public, and that no restrictions should be placed on his work activities. Red Star allowed Taylor to return to work on October 18, 2002. During the eighteen months in which he had not been cleared to work by Red Star, Taylor filed a grievance with his union's Joint Area Committee on April 2, 2001 (denied on May 8, 2001), as well as a discrimination charge against Red Star with the EEOC on May 16, 2001. Red Star contends Taylor gave Saylor materials on reasonable accommodations for epileptics prepared by the Epilepsy Foundation, and falsely claimed to the EEOC that he had epilepsy. Taylor also found interim employment driving a forklift elsewhere for several months.

Taylor sued Red Star on April 8, 2003, alleging Red Star had discriminated against him in violation of the ADA because it regarded him as disabled. Red Star responded that it had refused to allow Taylor to work not because it regarded him as disabled, but because doctors had not cleared him to return to work. Both Red Star and Taylor filed motions for summary judgment that the District Court denied. The case was tried to a jury, which found Taylor proved by a preponderance of the evidence that Red Star regarded him as disabled, that he was qualified to perform the essential functions of his job with or without accommodation, and that he had been discriminated against by Red Star because it regarded him as disabled. The jury also found Red Star had failed to prove by a preponderance of the evidence that Taylor had misinformed Red Star about his medical condition. It awarded Taylor a total of $158,796.34 in back pay, lost pension benefits, and compensatory damages. The District Court entered a final judgment in Taylor's favor on October 13, 2004. On October 26, 2004, Taylor's counsel filed a motion

for $367,388.15 in attorney's fees under the ADA. The next day, Red Star moved for judgment as a matter of law or, in the alternative, a new trial, contending there had been errors in the jury charge. On March 9, 2005, the District Court denied Red Star's post-judgment motion and granted Taylor's counsel's motion for attorney's fees in part. It later also granted Taylor's counsel's supplemental motion for attorney's fees on June 8, 2005, so that Taylor was awarded a total of roughly $290,000 in attorney's fees.

II. Red Star's Motion for Judgment as a Matter of Law or a New Trial

Red Star appeals the District Court's entry of final judgment, as well as its denial of a motion for a new trial on the basis of prejudicial errors in the jury charge. We review the denial of a new trial motion for abuse of discretion. *Honeywell, Inc. v. Am. Standards Testing Bureau, Inc.*, 851 F.2d 652, 655 (3d Cir. 1988). Where, as here, a party properly objects to a jury instruction under Fed. R. Civ. P. 51, we exercise plenary review to determine whether the instruction misstated the applicable law. *Franklin Prescriptions, Inc. v. N.Y. Times Co.*, 424 F.3d 336, 338 (3d Cir. 2005). We generally review jury instructions for abuse of discretion to determine whether they are misleading or inadequate. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 929 (3d Cir. 1997).

The District Court instructed the jury: "you need not decide whether USF-Red Star prevented Mr. Taylor from returning to work because of his medical condition. There is no dispute as to this fact." (J.A. 1412.) Red Star contends this instruction was plainly false, gravely prejudiced Red Star's defense that it refused to allow Taylor to return

to work because no physician had cleared him to drive a forklift (rather than because of his medical condition), and bolstered Taylor's case and credibility. In denying Red Star's objection to the instruction, the District Court noted: "Well, it's really a sequence of things, isn't it? Because of [Taylor's] seizures, the doctors gave certain opinions, et cetera, but it was basically because he had seizures that he was precluded from going to work. . . . [F]undamentally, initially, it was because he had seizures that he was sent home." (J.A. 1252-54.) Moreover, Saylor testified that, on initially sending Taylor home, he told him:

> [D]riving a forklift seems to me places yourself and some other employees in just as much danger as driving a truck might. . . . [U]ntil we get further information from your treating physician with them telling us it's a good idea for you to be doing this or medically possible for you to be doing this . . . we [will] not be calling [you] for work.

(J.A. 823.) We conclude the District Court did not abuse its discretion in instructing the jury as it did, and that the instruction was not misleading or inadequate.[1]

---

[1] The recent Eighth Circuit decision cited by Red Star's counsel in his November 14, 2006, letter to the Court is distinguishable. The defendant employer in *Pittari v. American Eagle Airlines, Inc .*, Nos. 05-4181 & 06-2287, 2006 WL 3230089 (8th Cir. Nov. 9, 2006), placed narrow, temporary restrictions on the plaintiff employee's work only *after* receiving a medical diagnosis (with which the employee initially agreed) that the employee's cognitive faculties might impair his ability to perform certain safety-sensitive duties. Here, by contrast, there was evidence Red Star (through Saylor) discovered Taylor had suffered seizures and then *sua sponte* prevented him from working at all *until* a medical diagnosis could clear him to do so. Moreover, the Eighth Circuit

(Continued on following page)

The District Court also instructed the jury on the meaning of "major life activity" under the ADA:

> [T]he phrase "major life activity" means an activity that an average person can perform with little or no difficulty. Examples are caring for oneself, walking, breathing, seeing, hearing, and working. Mr. Taylor claims that USF-Red Star perceived him as having epilepsy or a seizure disorder, which substantially limited his major life activities of walking, breathing, caring for himself, remaining conscious and/or working and that it so classified him without a factual foundation.
>
> Now merely driving a forklift or truck is not a major life activity. To find that USF-Red Star regarded Mr. Taylor as having an impairment, which substantially limited [his] major life activity of working, plaintiff must prove that USF-Red Star believed that Mr. Taylor had an impairment which restricted his ability to perform either a class of jobs or a broad range of jobs in various classes, as compared to the average person, having comparable training, skills and abilities. The inability to perform one type of job, a specialized job, or a particular job of one's choice, does not necessarily mean that one is substantially limited in the major life activity of working.

---

held that, because the employee had only presented evidence showing he was disqualified from a narrow range of jobs, as opposed to the major life activity of working, the employer was entitled to summary judgment on the employee's ADA claim. *Id.* at *6. Here, by contrast, there was evidence Red Star saw Taylor as disqualified from a broad range of work, and the jury found Red Star regarded him as disabled.

(J.A. 1416-17.) Quoting only the first sentence of this instruction, Red Star contends it was "'legally erroneous'" and "plainly did not 'fairly and adequately' submit the issues to the jury." (Red Star Br. 29.) Both at trial and in its brief, Red Star contended the District Court should have instructed the jury that a "major life activity" is an activity "of central importance to daily life" (Red Star Br. 28-29; J.A. 1269-70), relying on *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* 534 U.S. 184, 197 (2002).

Toyota dealt with the "major life activity of performing manual tasks," which it found "different" from the major life activity of working. 534 U.S. at 200. In *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 491 (1999), the Court assumed without deciding that working was a major life activity under the ADA, and found that a showing of being "substantially limited" in the major life activity of working under the ADA "requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." It noted this was consistent with ADA regulations promulgated by the EEOC, which state:

> With respect to the major life activity of working . . . [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3) (2005). As the District Court noted in its order denying Red Star's new trial motion, this Court has also followed *Sutton* in applying the "class" approach to the major life activity of working. *See Edwin*

Taylor v. USF-Red Star Express, Inc., No. 03-2216, at 6 (E.D. Pa. Mar. 8, 2005) (citing *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 517 (3d Cir. 2001)). And in *Toyota*, the Court cited both *Sutton* and the EEOC regulations in noting the "class" approach still applied to determining whether an individual was substantially limited in the major life activity of working, though not the major life activity of performing manual tasks. 534 U.S. at 200. We conclude there was no error in the District Court's instruction on the meaning of "major life activity," which was consistent with *Toyota*, *Sutton*, our precedent, and the EEOC regulations.

Red Star also appeals the District Court's denial of its motion for judgment as a matter of law, on grounds Taylor presented no evidence for any reasonable juror to find that Red Star regarded Taylor as "disabled," and that, even if a reasonable juror could have found Red Star regarded Taylor as disabled, a plaintiff cannot recover on a "regarded as" disability theory when he unreasonably fails to correct the defendant's mistaken perception of his impairment. We will affirm the denial of a motion for judgment as a matter of law "unless the record is 'critically deficient of that minimum quantity of evidence from which the jury might reasonably afford relief,'" and regard the evidence in the light most favorable to the non-moving party. *Honeywell*, 851 F.2d at 654-55 (quoting *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 921 (3d Cir. 1986)).

Red Star contends no reasonable jury could have found Red Star regarded Taylor as "disabled," because Taylor presented no evidence regarding Red Star's perception of the frequency or severity of the seizures Taylor suffered, and no evidence Red Star believed Taylor's seizures prevented him from doing anything other than

driving a truck or forklift. In fact, the trial record contains evidence Red Star believed Taylor was "seizure prone" so that he "might have another seizure and be a danger to the public" (J.A. 883), and that "no matter what he was doing [he] could be a threat to himself [and] others" (J.A. 332). An email discussing Red Star's possible response to complaints by Taylor's union also reflects this perception:

> We need to disclaim Local 107's claim that we have enough "floor" work to have kept Mr. Taylor supplied with work. This is a [sic] simply untrue. You can't work our dock in [Philadelphia] or anywhere without the need to operate a forklift being prevalent through 75 to 90 percent of your time.
>
> . . . Since just walking a dock requires careful awareness of everything around you, suppose a seizure would occur and the afflicted person falls into the path of a forklift. The person risks serious injury or death. Suppose the seizure prone person is walking into a trailer or is near the edge of the dock for other reasons. Suppose a seizure occurs and the person falls from the dock to the pavement . . . below?

(J.A. 1669.)[2] Viewing the evidence in the light most favorable to Taylor, we conclude a jury could reasonably have

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[2] As the District Court noted, Red Star's own motion for judgment as a matter of law stated Taylor had suffered seizures that prevented him from walking or talking. *Edwin Taylor v. USF-Red Star Express, Inc.*, No. 03-2216, at 6 (E.D. Pa. Mar. 8, 2005) (order denying Red Star's motion for judgment as a matter of law or, in the alternative, a new trial). The motion also stated if Taylor suffered another seizure "while working on the dock" he could fall into the path of another forklift. Mem. of Law in Supp. of Def.'s Post-Trial Mot. for J. as a Matter of Law

(Continued on following page)

found Red Star regarded him as "disabled," and accordingly that the District Court did not err in denying Red Star's motion for judgment as a matter of law on that ground.

Red Star contends that even if a reasonable jury could have found Red Star regarded Taylor as disabled, it is entitled to judgment as a matter of law because Taylor caused and fostered any mistaken impression that Red Star had concerning his condition. In *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180 (3d Cir. 1999), we found an employer could be held liable for regarding an employee as disabled even when that perception was mistaken, but that a "reasonable mistake" defense was sometimes available when the employee was responsible for the mistaken perception. Specifically, we stated:

> If an employer regards a plaintiff as disabled based on a mistake in an individualized determination of the employee's *actual condition rather than on a belief about the effects of the kind of impairment* the employer regarded the employee as having, then the employer will have a defense if the employee unreasonably failed to inform the employer of the actual situation.

Id. at 193 (emphasis added). Red Star contends it made decisions based on an individualized determination of Taylor's condition, and that Taylor knowingly misled Red Star into regarding him as having epilepsy.[3]

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or, in the Alternative, for a New Trial at 21, *Taylor*, No. 03-2216 (E.D. Pa. Oct. 27, 2004).

[3] Specifically, Red Star contends Taylor: told Saylor he had been diagnosed with infantile epilepsy and provided Red Star with literature on accommodations for epilepsy; signed an EEOC discrimination charge

(Continued on following page)

But there was evidence Red Star's perception that Taylor had a serious epileptic condition preventing him from working in any capacity on Red Star's dock was not based on information from Taylor, but on the assessments of doctors reporting to Red Star. For example, Dr. Mascaro testified he was concerned at least as early as March 26, 2001, that Taylor was unable to operate a motor vehicle due to a seizure disorder, and, upon seeing Dr. Scardigli's late March 2001 opinion that Taylor was capable of operating a forklift, that he called Dr. Scardigli "about the potential danger of someone with epilepsy operating a motorized vehicle." (J.A. 481-82.)

As the District Court noted in denying Red Star's motion for judgment as a matter of law, "[t]here was conflicting evidence on this issue, and the Jury clearly resolved it in favor of [Taylor]. In keeping with Supreme Court precedent, this Court is obligated to respect the Jury's conclusion." *Taylor,* No. 03-2216, at 7 (E.D. Pa. Mar. 8, 2005) (order denying Red Star's post-trial motions) (citing *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150-51 (2000)). Viewing the evidence in the light most favorable to Taylor, we conclude a jury could reasonably have found Red Star's perception of Taylor as disabled was not a result of Taylor's unreasonably failing to inform Red Star of his condition, and accordingly that the District Court did not err in denying Red Star's motion for judgment as a matter of law on that ground.

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in which he falsely stated he had been diagnosed with epilepsy and Red Star had discriminated against him for that reason; wrote a letter to Red Star requesting accommodation for epilepsy on May 17, 2001; and testified he never believed he had epilepsy. (Red Star Br. 8, 38.)

III. The District Court's Awards of Attorney's Fees

The District Court awarded Taylor's counsel a total of roughly $290,000 in attorney's fees under the ADA, 42 U.S.C. § 12205, for approximately 1242 hours of work (roughly $246,000 in response to the initial motion for attorney's fees and roughly $44,000 in response to his supplemental motion for attorney's fees). In making the awards, the court noted "[t]he underlying litigation was extremely hard-fought and contentious, mostly due to [Red Star's] apparent strategy of fighting [Taylor] at every turn, through the extensive pre-trial motions practice to post-trial motions." *Taylor,* No. 03-2216, at 1 (E.D. Pa. Mar. 8, 2005) (order granting in part Taylor's initial motion for attorney's fees). Red Star appeals both the District Court's initial and supplemental awards of attorney's fees, while Taylor's counsel appeals the District Court's reduction of the initial award. We will affirm both awards.

A. Procedural History

The initial motion for attorney's fees sought roughly $367,000. Red Star responded to the motion, contending the fee request was excessive and that the District Court should reduce any fee award to a figure below $100,000. Red Star listed several "specific objections" to the hours for which Taylor sought compensation, contending they were excessive and unnecessary: it contended 241.7 hours supposedly expended on preparation of Taylor's ultimately unsuccessful summary judgment motion were excessive in a single-plaintiff case given counsel's expertise; and it contended 59 hours supposedly expended on preparation of jury instructions were excessive given the time that had already been expended in the case.

In its initial fee award of March 8, 2005, the District Court made three reductions to the hours presented in Taylor's initial motion for attorney's fees (3.5 hours for record-keeping irregularities and 44 hours of a senior attorney's trial time, because his presence had been unnecessary and redundant). It also provisionally withheld fees for the hours Taylor contended had been spent preparing his summary judgment motion and jury instructions. As to the 241.7 summary judgment motion hours, the District Court stated: "the amount of time billed for [the motion] is simply astounding (particularly in light of its ultimate failure) and therefore not completely reasonable." *Taylor,* No. 03-2216, at 9-10 (E.D. Pa. Mar. 8, 2005) (order granting in part Taylor's initial motion for attorney's fees). As to the 59 jury instruction hours, it stated: "this smacks of excessiveness." *Id.* at 11. For both figures, however, the court stated it could not "unilaterally, and without sufficient evidence, dictate the number of hours that would have been reasonable." *Id.* at 10. It stated Red Star had "submitted no contrary information, criticizing counsel's utilization of time as broadly unreasonable, excessive, and redundant," and directed Red Star (and allowed Taylor) to submit additional evidence as to the hours that *would* have been reasonable. *Id.* at 4, 10-11. If Red Star failed to submit such evidence, the court stated, it would consider Red Star to have constructively waived its objections to the summary judgment and jury instruction hours.

But Red Star declined to provide the evidence requested by the District Court. In a March 22, 2005, supplemental brief, it contended the initial attorney's fees order had found Taylor had failed to show that the hours he claimed were expended on his summary judgment

motion and jury instructions were reasonable. In directing Red Star to submit evidence on reasonableness, Red Star contended, the District Court had improperly shifted the burden of showing reasonableness from the fee applicant to the adverse party. It contended the specific objections in its November 9, 2004, response were sufficient to allow the District Court to reduce the hours for which Taylor's counsel were entitled to fees. Taylor's counsel, meanwhile, filed a supplemental affidavit on March 22, 2005, stating the hours expended in preparing the summary judgment motion and jury instructions were reasonable.

In an order of April 26, 2005, the District Court awarded Taylor attorney's fees for the 59 hours spent by his counsel preparing jury instructions (finding Taylor's attorney's contention in her supplemental affidavit that this amounted only to a week of time persuasive), but reduced the hours spent on the summary judgment motion for which it awarded fees from 241.7 to 41.32 (awarding fees only for the hours expended on the summary judgment brief's factual statement, because Taylor's bills were otherwise insufficiently detailed to separate time spent on individual arguments within the brief). In response to Red Star's brief, the court characterized its earlier order as not concluding that the hours submitted by Taylor for preparation of the summary judgment motion and jury instructions *were* unreasonable, but merely suspecting that they *might be* unreasonable. It stated it had invited Red Star to submit evidence "to lend credence to [Red Star's] opinion, and the Court's suspicion, that certain of [Taylor's] hours were excessive and redundant." *Taylor,* No. 03-2216, at 1 (E.D. Pa. Apr. 26, 2005) (order directing Red Star to remit fees to Taylor). The court stated it had not shifted the burden of proof from Taylor to Red Star:

> Quite the contrary, the Court suggested that the amount of hours spent on Plaintiff's Motion for Summary Judgment, and on Plaintiff's jury instructions, *may* have been unreasonable, and that the Court could not unilaterally ascribe an amount of hours that would have been reasonable given the record before it at that time. Although it may, in hindsight, have been appropriate to require, rather than suggest, that Plaintiff submit additional authority in order to prevail, Plaintiff has submitted exactly the kind of authority that the Court contemplated, rendering Defendant's concern moot.

Id. at 1 n.1. But the District Court's decision not to reduce the jury instruction hours seemingly relied in part on Red Star's failure to submit any evidence in response to the court's earlier order. *See id.* at 3 ("This conclusion is bolstered by Defense Counsel's unwillingness to submit any evidence supporting their contention that Plaintiff's Counsel spent an unreasonable amount of time preparing their jury charge.").

On April 20, 2005, while his initial motion for attorney's fees was still pending, Taylor's counsel filed a supplemental motion for attorney's fees, seeking $43,591.50 for 149.2 hours spent on post-trial motions and preparation of the initial motion for attorney's fees. On May 20, 2005, Red Star responded to Taylor's motion, contending it was both untimely under Fed. R. Civ. P. 54(d)(2)(B) (because filed more than fourteen days after any entry of judgment) and unreasonable. On May 26, 2005, Taylor's counsel contended the supplemental motion was not untimely, because they had reasonably waited until they had finished responding to Red Star's oppositional responses to the initial motion for attorney's fees before

filing it. On June 8, 2005, the District Court granted Taylor's supplemental motion for fees, rejecting Red Star's timeliness argument:

> [Red Star's] objections to the timeliness of [Taylor's] submission are groundless, given the completely logical timetable in which [Taylor's counsel] submitted their fee requests. How could [Taylor's counsel] submit a bill for the time spent preparing his fee petition before [they] completed its preparation and found out that it had been granted? [Red Star's] suggestion that this would somehow be appropriate does not comport with common sense. Although the Court may not have literally ordered the briefing schedule for the fees litigation, the Court is quite comfortable with the notion that such a briefing schedule was implied.

Taylor, No. 03-2216, at 1 (E.D. Pa. June 8, 2005).

B. Discussion

We review the reasonableness of an award of attorney's fees for abuse of discretion. *Rode v. Dellarciprete,* 892 F.2d 1177, 1182 (3d Cir. 1990). We can find an abuse of discretion if no reasonable person would adopt the District Court's view. *Silberman v. Bogle,* 683 F.2d 62, 65 (3d Cir. 1982). Whether the District Court applied the proper standards or procedures is a question of law subject to plenary review. *Rode,* 892 F.2d at 1182.

Red Star contends the District Court erred as a matter of law in directing Red Star to submit evidence on the number of hours that would have been reasonable for Taylor's counsel to expend in preparing the summary judgment motion and jury instructions, after it had already found that Taylor's counsel had failed to prove the

hours were reasonable. Our precedent on the calculation of an award of attorney's fees and appellate review is well settled: the party seeking attorney's fees has the ultimate burden to prove that the hours for which it seeks fees were reasonably expended, and hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. First, the petitioner must meet an initial burden by "'submit[ting] evidence supporting the hours worked and rates claimed.'" *Id.* at 1183 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983)). "In a statutory fee case, the party opposing the fee award then has the burden to challenge, by affidavit or brief with sufficient specificity to give fee applicants notice, the reasonableness of the requested fee." *Id.* (citing *Bell v. Utd. Princeton Props., Inc.,* 884 F.2d 713 (3d Cir. 1989)). Once the adverse party raises sufficiently specific objections to the fee request, a district court "has a great deal of discretion to adjust the fee award in light of those objections." *Id.* at 1183 (citing *Bell,* 884 F.2d at 721). But a district court may not make *sua sponte* reductions to fee requests based on material facts not raised at all by the adverse party, because that would deprive the fee petitioner of notice of the need to offer evidence of reasonableness and because statutory fee litigation is adversarial. *Bell,* 884 F.2d at 720, 719; *United States v. Eleven Vehicles,* 200 F.3d 203, 212 (3d Cir. 2000). In *Bell,* we stated "that the adverse party's submissions cannot merely allege in general terms that the time spent was excessive," but must identify both the general type of work being challenged and the specific grounds for contending that the hours were unreasonable. 884 F.2d at 720.

The District Court's language in the present case suggests that it did not believe Taylor's counsel had met

their initial burden of showing the hours spent on his summary judgment motion and jury instructions were reasonable. So, it may have committed an error of law in continuing to consider awarding fees to Taylor for hours that had not been shown to be reasonable. It also appears that the objections to the summary judgment and jury instructions hours made by Red Star were sufficiently specific to allow the District Court to reduce those hours, as they met *Bell's* two requirements and appeared sufficient to put Taylor on notice. Accordingly, it may have been legal error for the District Court to ask Red Star to submit additional information on those hours on the "suspicion" they were unreasonable.[4]

But even assuming *arguendo* that the District Court erred as a matter of law in applying the wrong standard to determine whether the hours submitted by Taylor for preparation of his summary judgment motion and jury instructions were reasonable, we conclude the error was harmless. *See Forrest v. Beloit Corp.*, 424 F.3d 344, 349 (3d Cir. 2005) ("An error will be deemed harmless only if it is 'highly probable' that the error did not affect the outcome of the case.").[5] As our precedents indicate, district courts

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[4] *Cf. Loughner v. University of Pittsburgh*, 260 F.3d 173, 179 (3d Cir. 2001) (finding error in district court's failure to consider defendants' substantive objections to plaintiff's fee petition in determining the reasonableness of hours and subsequent acceptance as reasonable of all the hours submitted by plaintiff "based on Defendants' failure to even attempt to estimate the number of hours and costs expended in defending this action").

[5] We have previously applied the "harmless error" rule to awards of attorney's fees. *See, e.g., Pa. Envtl. Def. Found. v. Cannon-McMillan Sch. Dist.*, 152 F.3d 228, 234-35 (3d Cir. 1998); *Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc.*, 50 F.3d 253, 260-61 (3d Cir. 1995); *Davis v.*

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have a great deal of discretion in making attorney's fee awards once the petitioner has satisfied the initial reasonableness burden and the adverse party has presented objections. And here the District Court did not rely on Red Star's failure to present further objections and award Taylor the full amount of fees he sought, but rather reduced the hours expended on summary judgment and jury instructions for which it awarded fees, from 300.7 to 100.32. It is highly probable that the same outcome would have resulted had the District Court simply ruled that Red Star's objections had put Taylor on notice of the need to defend the reasonableness of the hours in question. *See Taylor,* No. 03-2216, at 1 n.1 (E.D. Pa. Apr. 26, 2005) (order directing Red Star to remit fees to Taylor) ("Although it may, in hindsight, have been appropriate to require, rather than suggest, that Plaintiff submit additional authority in order to prevail, Plaintiff has submitted exactly the kind of authority that the Court contemplated, rendering Defendant's concern moot."). We conclude any legal error was harmless.

Red Star contends the District Court erred as a matter of law in granting Taylor's supplemental motion for attorney's fees, because it was filed more than fourteen days after any final judgment, in contravention of Fed. R. Civ. P. 54(d)(2)(B).[6] The 1993 Amendments to that rule stated: "What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees, and the amount of such fees. . . ." Notice is a

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S.E. Pa. Transp. Auth., 924 F.2d 51, 55-56 (3d Cir. 1991); *Francois v. Francois*, 599 F.2d 1286, 1296 (3d Cir. 1979).

[6] Fed. R. Civ. P. 54 is not jurisdictional. *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996).

greater concern in initial motions for attorney's fees than it is in supplemental motions, and courts considering the timeliness of supplemental motions have allowed those motions to be filed as long as their timing was reasonable. *See, e.g., Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.,* 31 F. Supp. 2d 866, 868 (D. Or. 1998) (finding plaintiff's motion for supplemental attorney's fees was timely, despite being filed more than fourteen days after the entry of judgment, because it was "filed within a reasonable time after the amount of fees incurred was known"); *Parker v. Califano,* 443 F. Supp. 789, 792 (D.D.C. 1978) ("[C]ounsel's decision not to file any supplemental fees motions until the case was completed in its entirety was perfectly reasonable."); *see also Bernback v. Greco,* No. 98-0230, 2005 WL 1563503, at *1 (M.D. Pa. June 30, 2005) (granting plaintiff leave to file a supplemental motion for post-judgment fees and negating defendant's contention that the supplemental motion was untimely).[7] We conclude the District Court did not err as a matter of law in granting Taylor's supplemental motion for attorney's fees because its timing was logical, despite the fact that it was filed more than fourteen days after any entry of judgment.

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[7] In contrast, courts in this Circuit have denied *initial* motions for attorney's fees filed more than fourteen days after the entry of judgment. *See, e.g., Mathews v. Lancaster Gen. Hosp.,* 87 F.3d 624, 642 n.12 (3d Cir. 1996) (noting, in upholding denial of initial motion for attorney's fees, that it "was not timely under Fed R. Civ. P. 54(d)(2)(B) because it was not filed and served within 14 days after entry of judgment"); *Berwyn Capital Invs., Inc. v. Shore Venture Group, LLC,* No. 01-0691, 2006 WL 2045700, at *1 (E.D. Pa. July 18, 2006) (finding plaintiff's initial motion for attorney's fees untimely because filed more than fourteen days after the entry of judgment, and noting that, "[w]hile it is probable that this court would have discretion to grant even an untimely motion for counsel fees, the circumstances of this case do not warrant such an exercise of discretion").

Both Red Star and Taylor contend the District Court abused its discretion in its awards of attorney's fees.[8] Red Star contends the District Court abused its discretion by failing to eliminate unnecessary and duplicative hours from Taylor's initial motion for fees and his supplemental motion for fees. And Taylor contends the District Court abused its discretion in reducing the hours expended on preparing Taylor's summary judgment motion for which it awarded fees from 241.7 to 41.32. In awarding fees, a district court "must make an adequate record upon which we can review its decisions." *Rode,* 892 F.2d at 1187. Here, the District Court based its fee awards on extensive billing records and exhibits, sought additional briefing to determine the reasonableness of certain hours, and cogently explained its reasoning in making reductions. We find the District Court did not abuse its discretion in making its awards of attorney's fees.

IV.

We will affirm the District Court's entry of final judgment, its denial of the post-judgment motion, and its attorney's fees awards.

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[8] The District Court awarded Taylor roughly $290,000 in attorney's fees, while his total recovery was roughly $158,000. But, as the District Court noted, this litigation has been quite contentious and time-consuming. And we have expressed "serious concerns with the practice of limiting an award of attorney's fees to maintain proportionality between the fees and the amount of damages awarded." *Washington v. Philadelphia Cty. Ct. of Common Pleas,* 89 F.3d 1031, 1039 (3d Cir. 1996) (citing *N.E. Women's Ctr. v. McMonagle,* 889 F.2d 466, 474-75 (3d Cir. 1989); *Cunningham v. City of McKeesport,* 807 F.2d 49, 52-54 (3d Cir. 1986)).

2005 WL 555372

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN TAYLOR, Plaintiff,	:	CIVIL ACTION NO. 03-2216
v.	:	
USF – RED STAR EXPRESS, INC., Defendant.	:	

MEMORANDUM AND ORDER

NEWCOMER, S.J. March 8th, 2005

Presently before the Court is Defendant's Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial (Doc. 86). For the reasons stated below, the Court denies this Motion.

I. BACKGROUND

This is an Americans with Disabilities Act ("ADA"), and Pennsylvania Human Relations Act ("PHRA") employment-discrimination case. Plaintiff had two seizure-like incidents, allegedly caused by the supplement "Creatine," and was placed on leave from his job at Defendant's Philadelphia trucking terminal. Defendant would not let Plaintiff return to work without certain certifications that Plaintiff claims were unnecessary and retaliatory. Defendant argues that, because driving a forklift was an essential function of Plaintiff's job, it was reasonable to demand assurances that he would not have a seizure while driving. At trial, there was conflicting evidence over what Plaintiff told Defendant and what Defendant demanded of Plaintiff.

The Jury returned a verdict for Plaintiff. Defendant now moves for judgment as a matter of law or, in the alternative, a new trial. The Court will deny this Motion.

II. LEGAL STANDARD

Defendant characterizes its Motion as one for relief as a matter of law, under FED. R. CIV. P. 50, and in the alternative for a new trial under FED. R. CIV. P. 59.[1]

A properly preserved Rule 50 Motion may be granted if "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the opposing party] on [the contested issue]." FED. R. CIV. P. 50(a)(1). *See Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3d Cir. 1989) ("The rule that a post-trial Rule 50 Motion can only be made on grounds specifically advanced on a motion for directed verdict at the end of plaintiff's case is the settled law of this Circuit") (internal citations omitted). The Court will draw all inferences in favor of Plaintiff, who prevailed before the Jury. This means, in short, that any conflicts in the evidence will be assumed to have been resolved in favor of Plaintiff, that the Court will not make credibility determinations or weigh the evidence, and that any evidence favorable to Defendant that the jury was not required to believe will be ignored. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000).

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[1] Defendant has not presented any discussion of the legal standards governing its Motion, perhaps in a tacit acknowledgment of the weakness of its Motion.

A district court grants a new trial pursuant to FED. R. CIV. P. 59(a) only when, "in the opinion of the trial court, the verdict is contrary to the great weight of the evidence, thus making a new trial necessary to prevent a miscarriage of justice." *Roebuck v. Drexel University,* 852 F.2d 715, 736 (3d Cir. 1988). In general, this Court has discretion over whether to grant or deny a motion for a new trial. *See American Bearing Co. v. Litton Industries, Inc.,* 729 F.2d 943, 948 (3d Cir. 1984), *cert. denied,* 469 U.S. 854 (1984) (internal citations omitted). Courts have historically granted a new trial to remedy prejudicial errors of law or to correct a verdict that is against the weight of the evidence. *Maylie v. Nat'l R.R. Passenger Corp.,* 791 F. Supp. 477, 480 (E.D. Pa. 1992), aff'd without opinion, 983 F.2d 1051 (3d Cir. 1992). Courts in the Third Circuit employ two different standards when deciding a motion for a new trial. When the Motion is based on a prejudicial error of law, the district court has broad discretion to order a new trial. *Klein v. Hollings,* 992 F.2d 1285, 189-90 (3d Cir. 1993). When, on the other hand, a party moves for a new trial because a verdict is against the weight of the evidence, a district court's discretion is much narrower. In such a situation, a Court can only grant a new trial when the jury's verdict resulted in a miscarriage of justice, or where the verdict "cries out to be overturned or shocks the conscience." *Williamson v. CONRAIL,* 926 F.2d 1344, 1353 (3d Cir. 1991). Here, Defendant seeks a new trial due to alleged errors of law. The Court will analyze Defendant's Motion against this framework.

III. ANALYSIS

A. *Rule 50 Motion*

Defendant failed to seek Rule 50 relief at trial for its business necessity defense, and therefore waived its ability to renew its motion for this defense. *See Kutner,* 868 F.2d at 617. It would not matter if Defendant had properly preserved this defense, however, because there was ample evidence to allow a reasonable jury to conclude that Defendant acted in exactly the prejudiced and uniformed manner that the ADA was designed to prevent. Even if the Motion had been properly preserved, it would be denied.

At trial, the Court deliberately rejected Defendant's Rule 50 Motion in favor of sending the disputed issues of fact to the Jury for resolution. The core of this case involved substantially disputed facts, facts that the Jury quite clearly resolved in favor of Plaintiff. There were ample grounds for the Jury to reach the conclusion that it did.

Defendant's exhaustion argument, which Plaintiff erroneously claims Defendant did not raise in its trial Rule 50 Motion,[2] must be rejected. The Court does not find support for this Motion in the facts adduced at trial, or in the law Defendant cites. First, Plaintiff testified to the Jury that he did not deliberately mislead the EEOC. Tr. 4 at 227. Defendant's statement that "the records evidence undisputedly establishes that Plaintiff knowingly misrepresented in his EEOC charge that he had a disability . . . " (Def.'s Mot'n at 27) is, therefore, quite obviously, a total distortion of the record. Moreover, Defendant has not cited to

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[2] Defendant did – *see* tr. 6 at 115. The Court will forgive Plaintiff for this failure to scrutinize the record.

any legal authorities that stand for the proposition that a court must dismiss a case premised on a flawed EEOC charge. Even if there were evidence that Plaintiff knowingly misrepresented him or her self to the EEOC, then, the Court is not sure that the remedy sought by Defendant would be called for. As such, no further discussion of this point is needed.

On their merits, the Court can easily reject the remainder of Defendant's Rule 50 arguments, namely that there was insufficient evidence for a reasonable jury to conclude that (1) Defendant regarded Plaintiff as disabled, and (2) that Plaintiff was not qualified for the position that he sought. First, there was extensive testimony, presented by both sides, as to Defendant's perception of Plaintiff, and the cause of that perception. Amongst other things, there was testimony that Defendant's agents thought that Plaintiff was seizure prone and a danger to the public. Tr. 5 at 70. If the Jury believed these statements, they could easily have believed that Defendant regarded Plaintiff as being substantially limited in one or more major life activities, such as walking or talking. "A plaintiff attempting to establish disability on the basis of 'substantial limitation' in the major life activity of 'working' must, at minimum, allege that he or she is "unable to work in a broad class of jobs." *Tice v. Ctr. Area Transp. Auth.,* 247 F.3d 506, 517 (3d Cir. 2001) (citing *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 491 (1999)). EEOC regulations also indicate that major life activities also include walking and breathing. *See Id.* at 512; *see* 29 C.F.R. 1630.2.[3]

[3] The Court notes that "breathing and walking" are contained in the EEOC regulations, but the Supreme Court has expressly refused to rule on the deference owed this definition by the courts. *See Sutton,* 527

(Continued on following page)

The disingenuousness of Defendant's argument on this point is belied by their own Motion, which states that Defendant was concerned that Plaintiff could have a seizure which rendered him "unable to walk, talk, make decisions, or indeed do anything." Def.'s Mot'n at 20. It is flatly frivolous to argue, on one hand, that Defendant did not view Plaintiff as disabled in a major life activity, while with the other claiming that Defendant correctly viewed Plaintiff as so disabled that he could lose the ability to walk, talk, or do anything else. Without reaching Plaintiff's other, valid, arguments against Defendant's Motion on this point, it is clear that the Motion must be denied.

Defendant next claims that, if it regarded Plaintiff as disabled, it was Plaintiff's fault for creating this misperception. There was conflicting evidence on this issue, and the Jury clearly resolved the conflict in favor of Plaintiff. In keeping with Supreme Court precedent, this Court is obligated to respect the Jury's conclusion. *See Reeves,* 530 U.S. at 150-51 (a court reviewing a Rule 50 Motion must disregard evidence favorable to the movant that the Jury was not required to believe).

Finally, Defendant argues that Plaintiff was not qualified for the position he sought because he could not perform the essential functions of the job. There was conflicting testimony on this issue, specifically on whether all dock workers needed to drive a forklift, and whether Plaintiff was, in fact, capable of driving a forklift. In the face of ample evidence, presented by both sides, the Jury

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U.S. at 480; *Tice,* 247 F.3d at 512. Because the Parties here do not challenge that breathing, walking, or working are major life activities, the issue does not need to be addressed.

resolved this issue in favor of Plaintiff. The Court must give this decision all due deference, and deny Defendant's Motion. *See id.*

B. *Defendant's Motion for a New Trial*

Defendant points to several alleged errors in the jury charge. First, Defendant takes issue with the Court's instruction that the reason it prevented Plaintiff from coming back to work was his medical condition. Defendant claims that, rather than being Plaintiff's medical condition, the reason that it refused to allow Plaintiff back to work was because it required a doctor's note clearing him to come to work. What, pray tell, would Plaintiff need a doctor's note for, if not a medical condition? Even if the instruction was a mischaracterization of the Parties' dispute (which it was not), it would amount to nothing more than harmless error. The Court has reviewed the disputed charges, and finds that, taken as a whole and viewed in light of the evidence, they fairly and adequately submitted the issues in the case to the Jury. *See PXRE Corp. v. Terra Nova Ins. Co.,* 76 Fed. Appx. 485, 489 (3d Cir. 2003) (citing *Ayoub v. Spencer,* 550 F.2d 164, 167 (3d Cir. 1977). The same is true of the remaining disputed charges, none of which form grounds for a new trial.

C. *Defendant's Request that this Court Defy 6-Month Old, Binding Third Circuit Law*

Defendant asks this Court to constructively reverse a Third Circuit decision holding that "regarded as" plaintiffs are entitled to reasonable accommodation. *See Williams v. Philadelphia Housing Auth. Police Dept.,* 380 F.3d 751, 772 (3d Cir. 2004). Defendant graciously admits that "a

panel of the Third Circuit" has already weighed in on this issue, it apparently wishes for this Court to rule differently. The Court will, obviously, refrain from taking Defendant's invitation.

IV. CONCLUSION

For the reasons stated above, Defendant's Motion is denied. An appropriate Order follows.

S/ Clarence C. Newcomer
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN TAYLOR, Plaintiff,	:	CIVIL ACTION NO. 03-2216
v.	:	
USF – RED STAR EXPRESS, INC., Defendant.	:	

ORDER

AND NOW, this 8th day of March, 2005, upon consideration of Defendant's Post-Trial Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial (Doc. 86), and Plaintiff's Response, it is hereby ORDERED that said Motion is DENIED. It is further ORDERED that the Parties' Motions to Exceed Page Limits (Doc. 87, 101) is GRANTED.

AND IT IS SO ORDERED.

S/ Clarence C. Newcomer
United States District Judge

2005 WL 555371

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN TAYLOR, Plaintiff,	:	CIVIL ACTION NO. 03-2216
v.	:	
USF – RED STAR EXPRESS, INC., Defendant.	:	

ORDER AND MEMORANDUM

NEWCOMER, S.J. March 8th, 2005

Presently before the Court is Plaintiff's Motion for Attorney's Fees and Costs (Doc. 80). For the reasons stated below, the Court grants this Motion, in part. The Court will reduce the hours in its lodestar calculation by forty-four (44), because Plaintiff's use of three senior attorneys during trial was unnecessary and redundant. The Court will also require certain additional briefing by Defendant (and, if he chooses, Plaintiff).

I. BACKGROUND

Plaintiff seeks attorney's fees and costs which Defendant claims are unreasonable. The underlying litigation was extremely hard-fought and contentious, mostly due to Defendant's apparent strategy of fighting Plaintiff at every turn, through the extensive pre-trial motions practice to post-trial motions. Defense counsel was aggressive and effective, and certainly made Plaintiff prove every element of his case. As the Court had expected, the Parties' considerable legal talents have again clashed, this time on the issue of fees.

II. LEGAL STANDARD

A prevailing plaintiff is eligible for an award of reasonable attorney's fees and costs under the ADA. *See* 42 U.S.C. § 12205. In general, "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). Plaintiff here received a jury verdict on the bulk of his claims, so he was certainly prevailing within the meaning of the law. The Court must now determine whether his proposed fees and costs are "reasonable" within the meaning of the statute. *Id.*

The accepted method of determining attorneys' fees is the "lodestar" method. *Rode v. Dellarciprete,* 892 F.2d 1177, 1183 (3d Cir. 1990). The lodestar method is a simple calculation; it multiplies the number of hours reasonably spent on a case by the reasonable hourly rates of those who worked them. *See Brytus v. Spang & Co.,* 203 F.3d 238, 242 (3d Cir. 2000). The result of the lodestar calculation is presumed to be reasonable. *See Washington v. Philadelphia County Court of Common Pleas,* 89 F.3d 1031, 1035 (3d Cir. 1996). After the party seeking fees submits its request, the adverse party can raise objections to it. From that point on, the Court has considerable discretion to adjust the fee award in light of those objections. *See Bell v. United Princeton Props., Inc.,* 884 F.2d 713, 720 (3d Cir. 1989). Here, Defendant takes issue with the reasonableness of both the hourly rate of, and hours billed by, Plaintiff's Counsel. The Court will deal with each issue in turn.

III. ANALYSIS

A. *Basis of the Court's Inquiry*

Whether an hourly rate is reasonable is a question of fact for the Court. *See Washington,* 89 F.3d at 1035. Plaintiff has submitted a detailed explanation of his fees, along with affidavits from counsel, and from other practicing attorneys, to justify the reasonableness of both his counsel's hourly rate, and of their time expenditures. Plaintiff has also submitted the median fee survey for the City of Philadelphia, from Community Legal Services, Inc. ("CLS"), a document that provides median ranges for attorneys in the Philadelphia area with different levels of experience. This document has been cited approvingly by the Third Circuit as probative of the reasonableness of an hourly rate. *See Maldonado v. Houstoun,* 256 F.3d 181, 187 (3d Cir. 2001). Finally, Plaintiff has submitted a recent Middle District of Pennsylvania opinion, in which Judge Kane approved of an hourly fee of $275.00 an hour for Mr. Lamar, one of Plaintiff's counsel. *See Equal Employment Opportunity Commission and Marion Shaub v. Federal Express, Corp.,* No. 02-1194 (M.D. Pa. filed Jan. 14, 2005). Defendant has not informed this Court of any facts which tend to support its argument that Plaintiff's hourly rates are unreasonable, with the exception of its criticicism that Mr. Lamar's hourly rate is higher than that suggested by CLS.

On the issue of whether counsel's expenditure of time was reasonable, Plaintiff has provided the Court with detailed billing records for each of the attorneys and support staff involved in the case and submitted affidavits from multiple experienced attorneys discussing the difficulties of the underlying case based on their review of its facts. *See Affidavit of William H. Ewing, Esq.,* attached as

Exh. F to Plaintiff's Motion. (hereinafter "Ewing Aff."); *Affidavit of Jordan B. Yeager,* attached as Exh. G to Plaintiff's Motion (hereinafter "Yeager Aff."). Defendant has submitted no contrary information, criticizing counsel's utilization of time as broadly unreasonable, excessive, and redundant.

B. *Plaintiff's Hourly Rates*

Plaintiff's three primary attorneys have requested rates of $300.00, $310.00, and $275.00 per hour. Ms. McKinley, Plaintiff's lead counsel through much of the proceedings, has been a lawyer for over twenty years, and has extensive litigation experience. *See Affidavit of Lorrie McKinley* at 2, attached as Exh. A to Plaintiff's Motion (hereinafter "McKinley Aff."). She has submitted three affidavits from local attorneys, all of whom are indisputedly qualified to offer their opinion on the reasonableness of her fee, and all of whom endorse it. Two of these affiants endorse Mr. Lamar's rate of $275.00 an hour, and one of them supports Mr. Meek's submission. Mr. Lamar has submitted an additional affidavit in support of his request, and also a recent Middle District Opinion awarding him a rate of $275.00 an hour. With one exception, Plaintiff's requests are consistent with the Community Legal Services ("CLS") fee schedule for attorneys with the commiserate level of experience. For Mr. Lamar, an attorney with fourteen years of experience, a rate of $275.00 an hour is slightly higher than the CLS suggestion of $220.00-$260.00.

Mr. Lamar's litigation and advocacy skills were quite clearly a cut above an average attorney's, and the Court has no trouble believing the multiple affidavits suggesting

that an attorney of Mr. Lamar's abilities can expect to garner $275.00 an hour. This conclusion is bolstered by the similar finding by Judge Kane of the Middle District of Pennsylvania. *See Shaub,* No. 02-1194, at *32-3.

Mr. Meek's request is at the low end of the CLS range for an attorney with more than twenty-five years of experience ($310.00-$400.00), and Ms. McKinley's request is within the CLS range for an attorney with between sixteen and twenty-five years experience ($250.00-$310.00). Defendant attacks Mr. Meek and Ms. McKinley as inexperienced litigators in the field of disability law, but the Court finds no support for this contention. Given their experience and performance at trial, the Court accepts the proposed hourly rates as reasonable. This Court has observed literally hundreds of attorneys before it, and it is quite clear that Plaintiff's counsel are better than most, at least in terms of oral advocacy. Defendant points out the many times that the Court corrected Plaintiff's Counsel, but fails to include Plaintiff's Counsel's rejoinders. Indeed, given the complexity of the facts at hand, Plaintiff's Counsel was quite clarifying at times. The remainder of Plaintiff's rates, for Mr. Earle and Mr. Resnick, are well within the CLS range. The Court accepts Plaintiff's proposed fee schedule.

B. *Reasonableness of Time Expended*

Plaintiff requests an award covering 1341.3 hours of legal work. Defendant challenges this number as inflated and unreasonable. The Court has reviewed Plaintiff's detailed logs, and accepts Plaintiff's submission with several adjustments. District courts should exclude hours from the lodestar calculation that are not reasonably

expended. *See Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. *See id.* at 434. In general, a court must make some explanation on the record for its reduction of hours when the grounds for the reduction are excessiveness or redundancy. *Rode,* 892 F.2d at 1187.

The lion's share of counsel's time was reasonable. As a number of the affiants have noted, Plaintiff's case was not an easy one to prove, in both a legal and factual sense. *See* Ewing Aff. at 4; Yeager Aff. at 4. Plaintiff's case was complex and he was fought at every turn by Defendant and its agents. Although certain of Plaintiff's briefs were simply too long, as Plaintiff's Counsel aptly notes, it is often more time-consuming to shorten a document with edits than to simply submit it as it is. *See* Plaintiff's Resp. at 16, n.34. In general, the Court's review of counsel's billing logs reveals that the bulk of their time was spent on time worthy pursuits.

Defendant attacks counsel's use of time as excessive and redundant, arguing that many tasks were staffed by two senior attorneys when one might have been adequate. Defendant also attacks the large amount of time (241.7 hours) counsel spent preparing summary judgment briefs, the large amount of time (59 hours) spent preparing jury instructions, and Plaintiff's utilization of three senior attorneys at trial when one or two would have sufficed.[1]

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[1] Defendant raises a panoply of other objections to Plaintiff's proposed fees, but the Court does not find merit in them. Defendant attacks Plaintiff's staffing of depositions (generally utilizing two attorneys), Plaintiff's billing for pre-trial preparation, Plaintiff's billing for document review, Plaintiff's billing for his response to Defendant's

(Continued on following page)

Additionally, Defendant has identified two small bookkeeping irregularities.

At the outset, Defendant's arguments tend to blur the fact that, in addition to being extremely factually complex, and rather legally complex, Plaintiff's case also occurred over a substantial period of time. The Court has reviewed Plaintiff's billing records and finds them generally reasonable. As such, the Court accepts Plaintiff's statement of hours with several exceptions: the Court finds that Mr. Meek's presence at trial was unnecessarily redundant, that counsel spent an excessive amount of time on an ultimately unsuccessful summary judgment motion, and that counsel spent an excessive amount of time on jury instructions. Additionally, the Court will reduce Ms. McKinley's time by 0.3 hours for an apparent bookkeeping irregularity in her account of hours on March 2, 2004, and likewise will reduce the time billed by her paralegal, Ms. Donnelly, by 2.2 hours, for an accounting irregularity on March 1, 2004.

1. *Mr. Meek's Presence at Trial*

Plaintiff was aptly represented at trial by two senior attorneys, Ms. McKinley and Mr. Lamar. Mr. Lamar played a critical and substantial role during trial and, the Court must note, he played the role with the aplomb and skill of a litigator many years his senior. His presence at trial, like Ms. McKinley's, was obviously crucial to Plaintiff's

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summary judgment motion, Plaintiff's billing for interoffice communication, and Plaintiff's research billing. The Court has reviewed Plaintiff's logs, and, given the complexity and contentiousness of the underlying litigation, deems the use of these hours reasonable.

success, and the time he has submitted (which includes travel time) is reasonable. There was no reason, however, that Plaintiff required an additional senior level attorney during trial. It is the Court's finding that Mr. Meek's presence during trial was unnecessary and redundant, and that it would be unreasonable to include it in the lodestar calculation.

It is certainly true that Mr. Meek's presence *may* have been helpful to Plaintiff, in that he may have offered strategic advice or kept notes for litigating counsel, but it is not reasonable to expect Defendant to pay for services which could have been performed by a lower-level attorney or paralegal, if said services were even called for. Mr. Meek, in this Court's view, played no role at trial other than spectator. The Court notes that Mr. Meek has a superb and illustrious reputation, and the exclusion of his trial time is in absolutely no way a reflection of his professional prowess. Because Mr. Meek's presence at trial was excessive and redundant, it is not a reasonable expenditure of hours. The Court strikes 44 hours from the Disabilities Law Project's request.

2. *Plaintiff's Summary Judgment Motion*

Plaintiff submits a bill for 241.7 hours spent preparing an unsuccessful summary judgment motion. Although the motion may have theoretically caused future time-savings, the amount of time billed for it is simply astounding (particularly in light of its ultimate failure) and therefore not completely reasonable.

First, the brief accompanying Plaintiff's Motion was extraordinarily, excessively long (roughly 83 pages, with 142 footnotes), when this Court's Protocols do not allow

briefs longer than fifteen pages without leave of Court (which Plaintiff did not seek or receive). This Court has, in the past, ordered re-briefing of excessively long motions, and, although it did not in this case, it is manifestly unfair to Defendant to allow counsel to be rewarded for such extreme violations of this Court's Protocols. Second, many of the points raised in Plaintiff's Motion were flatly inappropriate subject-matter for summary judgment in this case, including whether Plaintiff was regarded as being disabled, and whether Plaintiff was qualified to perform the position he sought. There were, quite clearly in this Court's view, disputed issues of material fact that prevented adjudication of many of these issues on summary judgment. The Court cannot, however, unilaterally, and without sufficient evidence, dictate the number of hours that would have been reasonable to spend on Plaintiff's motion. *See United States v. Eleven Vehicles,* 200 F.3d 203, 211-12 (3d Cir. 2000) (district court cannot sua sponte order the reduction of fees).

In order to aide the Court in its determination, Defendant must submit additional evidence (and, if it so desires, Plaintiff may submit additional evidence of reasonableness). Such evidence might include affidavits on the number of hours expended on similar motions in similar cases, or, in Defendant's case, its own invoices for its summary judgment motion in this case. As the Court does not yet have a sufficient record on which to rule, the lodestar will be entered without the time allotted to summary judgment, pending revision. Of course, Defendant may choose to waive its objection to this use of hours (which it will constructively do by failing to offer sufficient specific objections).

3. *Plaintiff's Jury Instructions*

Plaintiff submits a request for 59 hours spent preparing jury instructions. For three experienced attorneys, this smacks of excessiveness, and may therefore be unreasonable. Although the Court readily accepts the legal and factual complexity of this case, it is reasonable to expect that counsel's years of experience should cause cost-savings in areas like the preparation of jury instructions. Again, the Court requires additional evidence on this matter. Defendant (and Plaintiff if he chooses) shall submit such evidence as is relevant, and the Court will revisit this section of its ruling. Again, should Defendant fail to submit sufficient evidence, it will constructively waive the ability to contest the full award of hours.

C. *Lodestar Calculation*

The above reductions taken into account, the Court finds that the remainder of counsel's utilization of time was reasonable. The Court sees no need to further adjust the lodestar amount, as it has authority to do; all of the Court's other considerations, including that of the result obtained for Plaintiff, have been adequately addressed in its consideration of the reasonableness of the hours utilized. *See Hensley,* 461 U.S. at 434.

1. *McKinley & Ryan, LLC*

Ms. McKinley requests an award for 605 hours of counsel time and 150 hours of staff time. As discussed above, the Court will reduce this number by: (111 hours preparing Plaintiff's Motion for Partial Summary Judgment, inclusion to be determined at a later date) + (28.2 hours preparing jury instructions, inclusion to be determined at a

later date) + (0.3 hours for accounting irregularity) + (11.1 hours which Ms. McKinley has indicated should be billed at a paralegal rate) = 454.4 hours at a rate of $300.00 per hour, or $136,320.00, plus 11.1 hours at the paralegal rate of $85.00 an hour, or $943.50. This yields a total figure of $137,263.50. The Court also awards expenses in the amount of $8,493.55.

Ms. McKinley has submitted invoices for staff time, which is compensable. Ms. McKinley indicated in her affidavit, however, that she had made certain adjustments to her paralegal billings due to billing judgment. *See* McKinley Aff. at 8. Because many hours of paralegal time were spent on Plaintiff's Motion for Partial Summary Judgment, the Court will not attempt to interpret Ms. McKinley's use and billing of paralegal time. Rather, Ms. McKinley shall submit to this Court two new billing logs: one including paralegal and staff time utilized during preparation of Plaintiff's Motion for Partial Summary Judgment, and one for all other time billed. Defendant will immediately remit to Plaintiff the amount indicated by Ms. McKinley for other time billed. The time spent on Plaintiff's Motion for Partial Summary Judgment will, obviously, be addressed in the future.

2. *Mr. Lamar*

Mr. Lamar requests an award for 215.60 hours of counsel time at a rate of $275.00 an hour. The Court will reduce this number by (5.5 hours spent preparing jury instructions, inclusion to be determined at a later date) for a total figure of (210.10 hours x $275.00) $57,777.50. The Court also awards expenses in the amount of $3,372.51.

3. *The Disabilities Law Project*

Mr. Meek requests an award for 329 hours of personal attorney time, and reimbursement for a number of other lawyers at his firm. The Court will reduce this number by (44 redundant and excessive hours spent at trial) + (7 hours spent preparing jury instructions, inclusion to be determined at a later date) + (76 hours preparing Plaintiff's motion for summary judgment, inclusion to be determined at a later date) = 202.00 at a rate of $310.00 an hour, yielding a total figure of $62,620.00. The Court also awards (39.10 - 18.3 hours spent preparing jury instructions, inclusion to be determined at a later date) = 20.8 hours at a rate of $265.00 for Attorney Resnick, yielding a total of $5,512.00, and 21.75 hours for Attorney Earle at a rate of $245.00, yielding a total of $5,328.75. The total award, therefore, to the Disabilities Law Project, is $73,460.75. The Court also approves expenses in the amount of $2,644.93.

IV. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Fees is granted in part and denied in part. An Order follows.

S/ Clarence C. Newcomer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN TAYLOR,	:	CIVIL ACTION
Plaintiff,	:	NO. 03-2216
	:	
v.	:	
	:	
USF – RED STAR EXPRESS, INC.,	:	
Defendant.	:	

ORDER

AND NOW, this 8th day of March, 2005, upon consideration of Plaintiff's Motion for Fees (Doc. 80), Defendant's Response, Plaintiff's Reply, and Plaintiff's Supplemental Reply, it is hereby ORDERED that said Motions are GRANTED in part and DENIED in part. It is further ORDERED that Defendant remit to Plaintiff's Counsel the following amounts:

1. $137,263.50 in fees and $8,493.55 in expenses to the law firm of McKinley & Ryan, LLC.

2. $57,777.50 in fees and $3,372.51 in expenses to attorney Ralph Lamar, Esq.

3. $73,460.75 in fees and $2,644.93 in expenses to the Disabilities Law Project.

It is further ORDERED that Defendant (and Plaintiff, if he wishes), within 14 days of this Order, submit additional information, as they see fit, to justify their respective positions on the reasonableness of Plaintiff's Counsel's hours expended on jury instructions and on Plaintiff's Motion for Partial Summary Judgment.

It is further ORDERED that Plaintiff's Motion to Permit Supplementation of Plaintiff's Initial Fee Request (Doc. 106) is GRANTED.

AND IT IS SO ORDERED.

S/ Clarence C. Newcomer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN TAYLOR, Plaintiff,	:	CIVIL ACTION NO. 03-2216
v.	:	
USF – RED STAR EXPRESS, INC., Defendant.	:	

ORDER

AND NOW, this 26th day of April, 2005, upon consideration of the Parties Supplemental Briefs, Defendant's Motion to Strike (Doc. 117), and Plaintiff's Response, it is hereby ORDERED that Defendant's Motion to Strike (Doc. 117) is DENIED, and that Defendant remit to Plaintiff's Counsel the amount discussed below. The Court's reasoning follows.

In its Order of March 8, 2005, the Court allowed Defendant to file additional legal and factual support to lend credence to its opinion, and the Court's suspicion, that certain of Plaintiffs' hours were excessive and redundant. Rather than accepting the Court's invitation, Defendant filed a Response contending that the Court erred by asking Defendants to submit additional support for their position.[1] Plaintiff has taken the opportunity to further

[1] Defendant is incorrect that the Court has impermissibly shifted the burden of proof to it. Quite the contrary, the Court suggested that the amount of hours spent on Plaintiff's Motion for Summary Judgment, and on Plaintiff's jury instructions, *may* have been unreasonable, and that the Court could not unilaterally ascribe an amount of hours that would have been reasonable given the record before it at that time. Although it may, in hindsight, have been appropriate to require, rather than suggest, that Plaintiff submit additional authority in order to

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brief the Court as to why the hours expended by his attorney were reasonable. Predictably, as has been the case over the course of this litigation, Defendant has filed a Motion to Strike Plaintiff's Declaration.

It had, to this point, escaped this Court's attention that Defendant violated this Court's Scheduling Order by failing to submit its proposed instructions until the eve of

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prevail, Plaintiff has submitted exactly the kind of authority that the Court contemplated, rendering Defendant's concern moot. As to Defendant's contention that the use of its own bill for the same work would not be appropriate consideration for the Court, the Court finds this argument to be a red herring. The case that Defendant relies upon is not relevant. Defendants cite a Third Circuit case in which a district court was reversed when it granted plaintiff attorney's fees after the defendant refused to turn over its bills. In that case, the district court's reasoning was not logically consistent; specifically, the district court apparently sought the defendant's billing records for time spent responding to motions that it claimed were frivolous. *See Loughner v. The University of Pittsburgh,* 260 F.3d 173, 179 n. 4 (3d Dir. 2001) ("We can infer the District Court meant that if Defendant's counsel spent many hours on this action defending unreasonable claims, this could constitute evidence that plaintiff's counsel expended a reasonable time on plaintiff's claims. This is a non sequitur. We are uncertain whether this was the District Court's rationale, and we are equally uncertain how this premise leads to the conclusion that plaintiff's petition must be reasonable."). In this case, the information that the Court sought was the amount of hours that might be reasonably expanded seeking summary judgment, and crafting proposed jury instructions, in a case with a legal and factual complexity like the one at hand. As Defendant sought summary judgment on (largely) the same issues as Plaintiff, and as the jury instructions were on the same issues, it would have been probative to have access to that amount of hours expanded by Defendant, especially seeing as Defendant lodged the naked assertion that Plaintiff's Counsel were inefficient. Despite Defense Counsel's cries, the Court's suggestion that they submit their hours was not an unusual one. *See Shesko v. City of Coatesville,* No. 01-6780, 2004 U.S. DIST LEXIS 16793, at *13 (E.D. Pa. Aug. 24, 2004) (reducing award of hours to plaintiff's counsel to the amount of hours defense counsel spent on the same task).

trial. Plaintiff's Counsel cites this as evidence that the 59 hours they spent preparing jury instructions was reasonable, but this assertion is undercut by the virtual absence of any time spent by Plaintiff's Counsel preparing jury instructions after September 24, 2004, the day Defendant submitted their instructions. It is, however, probative of the difficulty underlying the preparation of the proposed charge in this case; the Court can reasonably conclude that either (1) the case law was so difficult that Defense Counsel, who were superb on the brief and over the course of trial, were overwhelmed by it and unable to finish their proposed charge on time, or (2) that Defense Counsel, who in general were extremely courteous to the Court, deliberately missed a deadline, presumably to stymie their opponents. Both conclusions lend support to the seemingly large amount of time spent on hours, as Plaintiff would want to be prepared for any eventuality at trial, given Defense Counsel's strategy of zealously exploiting every uncertainty in favor of their client, and given the nebulous state of the law.

Considering the complexity of this case, the evolving legal standards (some of which literally were in a state of flux until shortly before trial), and Defendant's violation of this Court's protocols that proposed points of charge be submitted along with pre-trial memoranda several weeks before trial, it appears to this Court that some substantial amount of time on jury instructions was reasonable. Plaintiff's Counsel notes that 59 hours is essentially one week's work for one attorney, and the Court finds this persuasive. This conclusion is bolstered by Defense Counsel's unwillingness to submit any evidence supporting their contention that Plaintiff's Counsel spent an unreasonable amount of time preparing their jury charge.

Defendant shall remit the following amounts to Plaintiff's Counsel:

$300 x 28.2 hours = $8,640.00 to Attorney McKinley

$310 x 7 hours = $2,170.00 to Attorney Meek

$275 x 5.5 hours = $1,513.50 to Attorney Lamar

$265 x 18.3 hours = $4,849.50 to Attorney Resnick.

As to the amount of hours expanded on Plaintiff's unsuccessful Motion for Summary Judgment, the Court must strike the great majority of hours expanded. Plaintiff's Counsel notes that the factual statement in this Motion was useful in his Response to Defendant's Motion for Summary Judgment; the Court agrees. Plaintiff has submitted 21.8 hours of time spent by Attorney McKinley, editing the factual statement in Plaintiff's Motion, and 19.52 hours spent by Attorney Meek editing the same. Defendant shall remit (21.8 hours x $300 =) $6,540.00 to Attorney McKinley and (19.52 hours x 310 =) $6,051.20 to Attorney Meek. Although there may have been some merit to some of the claims raised in Plaintiff's Motion for Summary Judgment, the Court would consider awarding additional hours; however, the legal bills submitted by Plaintiff, while detailed, are not detailed enough to separate the time spent on individual portions of Plaintiff's Motion. Plaintiff's counsel implicitly suggest that this Court calculate the average amount of time spent on each page of the brief, and issue an award based on the number of pages of potentially meritorious claims, but the Court must reject this suggestion.

The reality of brief-writing is that a vastly disproportionate amount of time is spent on different legal issues; thus, a twenty page brief could easily take 100 hours to prepare, with ten hours going to the issues discussed in

the first ten pages and ninety hours to the issues discussed in the second ten pages. Moreover, a ten-page brief, after several rounds on the chopping block, could take 120 hours to prepare. For this reason, the Court will only award Plaintiff time spent on the factual statement, as the hours spent on its preparation are explicitly detailed on Counsel's billing records; to try to impute the amount of hours spent on each of the other sections, in the absence of a record allowing such judgments, would be unjust. The Court has scrutinized Counsel's billing records, and awarded to them compensation for that amount of hours which were clearly reasonably expanded; no more, and no less, are called for.

AND IT IS SO ORDERED.

S/ Clarence C. Newcomer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN TAYLOR, Plaintiff,	:	CIVIL ACTION NO. 03-2216
v.	:	
USF – RED STAR EXPRESS, INC., Defendant.	:	

ORDER

AND NOW, this 8th day of June, 2005, upon consideration of Plaintiff's Supplemental Motion for Fees (Doc. 124), Defendant's untimely Response, Plaintiff's Motion to Strike (Doc. 136), and the Parties' Replies, it is hereby ORDERED that Plaintiff's Motion for Fees is GRANTED, and that Plaintiff's Motion to Strike is DENIED.

Plaintiff has submitted a request for fees and costs incurred during the preparation of his original Motion for Attorneys' Fees. The Court has reviewed the supporting documentation to Plaintiff's request (time sheets and affidavits from Plaintiff's Counsel), and finds that the amount of time spent by Counsel is quite reasonable given the magnitude of the fees litigation. Defendant's objections to the timeliness of Plaintiff's submission are groundless, given the completely logical timetable in which Plaintiff submitted their fee requests. How could Plaintiff submit a bill for the time spent preparing his fee petition before he completed its preparation and found out that it had been granted? Defendant's suggestion that this would somehow be appropriate does not comport with common sense. Although the Court may not have literally ordered the briefing schedule for the fees litigation, the Court is quite comfortable with the notion that such a briefing schedule

was implied. As such, the Court orders Defendant to remit to Plaintiff's Counsel the following amounts:

1. $35,369.00 in fees and $691.61 in expenses to the law firm of McKinley & Ryan, LLC.

2. $8,222.50 in fees and $1.11 in expenses to attorney Ralph Lamar, Esq.

AND IT IS SO ORDERED.

S/ Clarence C. Newcomer
United States District Judge

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN TAYLOR,	:	
Plaintiff,	:	
v.	:	**Civil Action**
USF-RED STAR EXPRESS, INC.,	:	**No. 03-2216**
Defendant.	:	

ORDER

AND NOW, this 8th day of June 2005, upon consideration of Defendant's Motion for a Stay of Execution of Judgment, and any response thereto, it is hereby ORDERED pursuant to Fed.R.Civ.P. 62(d) that Defendant's Motion is GRANTED and execution of the judgment entered on October 13, 2004, and the March 8, 2005 and April 26, 2005 Orders granting in part Edwin Taylor's Motion for Attorneys' Fees, are hereby stayed pending a final determination of Red Star's appeal to the United States Court of Appeals for the Third Circuit.

BY THE COURT

S/ Clarence C. Newcomer
Senior U.S. District Court Judge

No. 06-1284

In The

Supreme Court of the United States

USF-RED STAR EXPRESS, INC.,

Petitioner

v.

EDWIN B. TAYLOR

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Third Circuit's unpublished opinion below properly affirm a jury instruction in a trial pursuant to the Americans with Disabilities Act (ADA), which defined "major life activities" as activities an average person can perform with little or no difficulty," such as caring for one's self, walking, breathing, seeing, hearing, and working," and in which the jury was asked to consider only whether the plaintiff had proved that Red Star regarded him as substantially limited as to his ability to care for himself, walk, breathe, see, hear, or work?

2. Did the Third Circuit properly affirm the District Court's denial of a new trial where the jury concluded that Plaintiff had proved by a preponderance of the evidence that Red Star regarded him as having a substantial limitation in one or more of the major life activities of caring for one's self, walking, breathing, seeing, hearing, and working?

3. Did the Third Circuit properly affirm the District Court's affirmance of a jury verdict against Red Star when the jury concluded "that Red Star's erroneous perceptions that Mr. Taylor had a disability as defined by the ADA was not the result of any misinformation provided to the company by the plaintiff," and that Red Star's perceptions and its adverse

actions against the plaintiff were "not founded on reliable medical evidence as to the nature of the risk, the duration of the risk, the severity of the risk, and the probabilities that the disability will cause harm?"

4. In this direct evidence case, did the Third Circuit properly affirm the District Court's jury instruction that Red Star prevented the plaintiff from returning to work based on his medical condition when Red Star admitted that but for the plaintiff's medical condition there would have been no adverse action, and further admitted that it would not permit the plaintiff to return to work without an unqualified medical clearance?

5. Did the Third Circuit properly conclude that Respondent's Motion for Supplemental Attorneys fees was timely under F.R.C.P. 54 (a)(2)(B) when that motion, filed April 20, 2005, pre-dated the District Court's April 27, 2005 disposition of his original motion for attorneys fees by seven days?

TABLE OF CONTENTS

Page

Counterstatement of the Questions Presented for Review i

Table of Contents iii

Table of Authorities v

Statutory Provisions Involved xi

Counterstatement of the Case 1

Factual Background and the Proceedings Below..... 2

Reasons for Denying the Writ..... 7

A. Based on This Court's Opinion in *Toyota v. Williams,* Red Star Requested the Jury Instruction The District Court Gave as to What Constitutes a Major Life Activity Under the ADA; That Instruction Was Fully In Accord with *Williams* and was Properly Affirmed By the Third Circuit 7

B. There Is No "Circuit Split" As To What Proof An ADA Plaintiff Must Adduce To Prove An Actual vs. A Perceived Disability... 12

TABLE OF CONTENTS - Continued

Page

C. The Jury Found That Mr. Taylor Was Not Responsible for Red Star's False Perception Of His Medical Condition, and There Is No Factual Predicate For A Limited Reasonability Defense 16

D. The Third Circuit Correctly Affirmed The District Court's Direct Evidence Jury Instruction That Red Star's Adverse Action Against Mr. Taylor Was Based on His Medical Condition, But That Red Star Did Not Believe That Mr. Taylor was Qualified..... 20

E. There is No Circuit Split Between The Third Circuit And The Second As to the Application of F.R.C.P. 52..... 24

Conclusion 27

TABLE OF AUTHORITIES

Page

CASES

Bernback v. Greco, No. 05-4642, 2007 WL 108293 (3rd Cir. Jan. 16 2007)..... 25

Best v. Shell Oil Co., 107 F.3d 544 (7th Cir. 1997)..... 19

Bragdon v. Abbot, 524 U.S. 624(1999)..... 17

Breitkruetz v. Cambrex Charles City, Inc., 450 F.3d 780 (8th Cir. 2006)..... 17, 18

Deane v. Pocono Medical Center, 142 F.3d 138 (3rd Cir. 1998)..... 12

EEOC v. Kinney Shoe Co., 917 F. Supp. 419, *aff'd,* 104 F.3d 683 (4th Cir. 1997)..... 13

EEOC v. Schneider National Inc., No. 06-3108, 2007 U.S.App. LEXIS 654 (7th Cir., March 21, 2007)..... 18

TABLE OF AUTHORITIES - Continued

Page

EEOC v. Sears & Roebuck Co., Inc., 417 F.3d 789 (7th Cir. 2005)..... 10

EEOC v. Yellow Freight, 2002 U.S. Dist. LEXIS 16826 (2002)..... 5

Emory v. Astra-Zeneca Pharmaceuticals LP, 401 F.3d 174 (3d Cir. 2005)..... 11

Gillen v. Fallon Ambulance Services, Inc., 283 F.3d 11 (1st Cir. 2002)..... 18

Heise v. Genuine Parts Co., 900 F. Supp. 1137 (D. Minn. 1995)..... 5

Henderson v. Ardco, 247 F.3d 645 (6th Cir. 2001)..... 5

Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998)..... 5

Holiday v. City of Chattanooga, 206 F.3d 637 (6th Cir. 2000)..... 19

Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379 (N.D. Iowa 1995)..... 5

Lowe v. Alabama Power Co., 244 F.3d 1305 (11th Cir. 2001)..... 19

TABLE OF AUTHORITIES - Continued

Page

McGregor v. National R.R. Passenger Corp., 187 F.3d 1113 (9th Cir.1999)..... 5

Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418 (N.D. Cal. 1996), *aff'd*, 191 F. 3d 1043 (9th Cir. 1999), *cert. denied*, 528 U.S. 1182 (2000)..... 5

Ollie v. Titan Tire Corp., 336 F.3d 680 (8th Cir. 2003)..... 19

Ottig v. J.C. Penny, 223 F.3d 704 (8th Cir. 2000)..... 13

Pittari v. American Eagle Airlines, Inc., 468 F.3d 1056 (8th Cir. 2006)..... 17, 18

Reeves v. Sanderson Plumbing, Inc., 530 U.S. 133, (2000)..... 16

Reimer v. Illinois DOT, 148 F.3d 800 (7th Cir. 1998)..... 19

Sarsycki v. United Parcel Service, 862 F. Supp. 336 (W.D. Okla. 1994)..... 5

Sutton v. United Airlines, Inc., 527 U.S. 471 (1999)..... 14

TABLE OF AUTHORITIES - Continued

Page

Tancredi v. Metro Life Ins. Co, 378 F.3d 220 (2d Cir. 2004), *cert. denied,* 539 U.S. 942 (2003) 25, 26

Taylor v. Pathmark, Stores, Inc., 177 F.3d 180 (3rd Cir. 1999)..... 12, 16

Taylor v. Phoenixville School Dist., 184 F.3d 296,(3rd Cir. 1999)..... 19

Tice v. Centre Area Transportation Authority, 247 F.3d 506 (3rd Cir. 2001)..... 12

Toyota Manufacturing Co. v. Williams, 534 U.S. 184 (2002)..... iii, 7, 8, 10

Warmsley v. MTA-NYCTA, 308 F. Supp. 2d 114 (E.D.N.Y. 2004)..... 5

Weigel v. Target Stores, 122 F.3d 461 (7th Cir. 1997)..... 5

Weyant v. Okst, 198 F.3d 311 (2d Cir. 1999)..... 25, 26

TABLE OF AUTHORITIES - Continued

Page

FEDERAL STATUTES

Americans with Disabilities Act

42 U.S.C. §12101 1

42 U.S.C. 12101 (9) 19

42 U.S.C. § 12111 (3) 20

42 U.S.C. § 12111 (8) xi

42 U.S.C.§ 12112 (a) xi

42 U.S.C. § 12112 (b)(5)(A) ..... xi, 5

42 U.S.C. § 12113 (b) 22

42 U.S.C. § 12119(9) 5

TABLE OF AUTHORITIES - Continued

Page

FEDERAL RULES AND REGUALTIONS

29 C.F.R. § 1630.2(i)..... 11

29 C.F.R. § 1630.2(j)(3)(i)..... 14

42 C.F.R. § 404. 1525-30 Appendix 1, (2002)..... 14

F.R.C.P. 52.....iv, 1, 2, 24

F.R.C.P. 54 (a)(2)(B)..... ii

F.R.C.P. 54(d)(2)..... 26

MISCELLANEOUS AUTHORITIES

H.R. Rep. No. 101-485 (II) at 73, 1990
U.S.C.C.A.N. at 356..... 18

Social Security Rules-87-6: Titles II and XVI..... 14

STATUTORY PROVISIONS INVOLVED

Red Star omits these critical provisions of the Americans with Disabilities Act from its Petition:

42 U.S.C. § 12111 (8): The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires....".

42 U.S.C.§ 12112 (a): No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112 (b)(5)(A): As used in subsection (a) of this section, the term discriminate includes: not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

In this case under the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.*, (ADA), the jury found that Edwin B. Taylor, the Respondent herein, suffered illegal employment discrimination when the Petitioner, USF-Red Star Express, Inc., refused to permit him to return to work in any capacity on its loading dock for more than twenty months after he suffered two non-epileptic seizures in March, 2001. The company took this action due to its false perception that Mr. Taylor was a "severe epileptic" who would be a hazard in the workplace "no matter what he was doing" and *"regardless what the medical evidence might show."* JA332; 1669.

The Third Circuit's unpublished opinion below does not, as Red Star histrionically claims, create a Circuit split as to either the statutory interpretation of the ADA or the application of Rule 52 of the Federal Rules of Civil Procedure to motions for supplemental attorneys fees.[1] The Third Circuit's opinion is factually driven and firmly ensconced in the jurisprudence which this Court has adopted for the disposition of claims of employment discrimination pursuant to the ADA. It does not diverge even slightly into uncharted areas of public policy. Moreover, the opinion is not precedential. As such, it is not binding even in the Third Circuit, and is highly unlikely to have any persuasive impact

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[1] The Third Circuit's unpublished opinion in this case is reprinted in the Appendix to Red Star's Petition at App. 1-22.

on any of the other Circuits.[2]

These factors, standing alone, make this case an inappropriate vehicle for further delineating the parameters of the ADA. Likewise, the Third Circuit's application of Rule 52 of the Federal Rules of Civil Procedure to Mr. Taylor's claim for supplemental attorneys fees, which was filed seven days *before* the District Court ruled on his initial fee motion and within the time the District Court directed, is record-based, devoid of policy implications, and completely consistent with the decisions from the Second Circuit upon which Red Star attempts to base its claim of a "Circuit split."

Red Star's arguments lack the necessary factual predicate to make them applicable to this case, and there is no reason for this Court to consider the legitimacy of defenses which are inapposite to the facts before it. Accordingly, Red Star's Petition should be denied.

FACTUAL BACKGROUND AND THE PROCEEDINGS BELOW

Red Star's petition is based disingenuously on a number of facts which were disputed at trial and upon which the jury found for Mr. Taylor, *not* Red Star. Most significantly, Red Star's proposed "safety" defenses all emanate from the notion that Mr. Taylor, as a "combination

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[2] According to the Third Circuit's Internal Operating Procedures, "Unprecedential Opinions" have value only to the trial court and the parties; the Court deems such opinions to be devoid of "precedential or institutional value." Third Circuit Internal Operating Procedures, Rule 5.2 and 5.3.

man,"[3] was required to drive a truck and/or operate a fork lift. Although at the time Mr. Taylor suffered his seizures he ordinarily exercised his seniority to drive commercial trucks,[4] it is undisputed that he was not required to do so: he had enough seniority to secure work o. the loading dock whenever he wanted it. JA177;1595-99; 1600-06.

Throughout the relevant time period Mr. Taylor had a medical release to manually load and unload trucks on Red Star's loading dock.[5] Although Red Star argued to the jury that operating a fork lift was an essential function of the dock job, the jury found to the contrary.[6] Numerous dock workers

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3 "Combination men" at Red Star drove trucks and worked on the loading dock. They secured their job assignments through bids which were allocated according to seniority. JA174. By contrast, "dock workers" at Red Star worked on the dock only. Red Star stipulated that dock workers do not drive trucks and are not required to have a license to do so. *See* Admission No. 6, JA254; *see also* JA314; 334. Red Star has approximately 25 dock workers who do not have commercial drivers licenses. JA183.

4 Mr. Taylor's seizures in March, 2001 were an isolated event caused by his use of a vitamin supplement called "creatine." JA 699; 1703.

5 JA 351; 427; 595; 627; 1595-99; 1600-1606.

6 The jury answered *"YES"* to the following question:

> "DO YOU FIND THAT THE PLAINTIFF HAS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT HE WAS QUALIFIED TO PERFORM THE ESSENTIAL FUNCTIONS OF HIS JOB AS A COMBINATION MAN OR DOCK WORKER AT USF-RED STAR WITH OR

testified that operating a fork lift was not essential; that Red Star gave them the discretion to load and unload trucks as they saw fit, with or without a fork lift; that much of Red Star's freight ~~had to be~~ moved *without* a fork lift; and that during the relevant time period less senior men than Mr. Taylor spent their time loading and unloading manual freight without using a fork lift. JA160-69; 181; 719-735. Red Star did not appeal from the jury's critical factual conclusion *against Red Star* that fork lift operation was *not* an essential function of the dock worker position, and the Third Circuit did not address it.

Because the jury concluded that operating a fork lift was not an essential function of the job to which Mr. Taylor requested to return, the other critical factual predicate for Red Star's appeal – that it only kept Mr. Taylor off the job because "the doctors" did not release him to return to work on a fork lift -- is inapposite. It is also false. Red Star repeatedly and by its own admission rejected numerous medical releases from Mr. Taylor which imposed no restrictions whatsoever on his ability to handle manual freight on Red Star's loading dock – indeed, it affirmatively

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> WITHOUT A REASONABLE ACCOMMODATION?"

JA1497. Likewise, the jury said *"YES"* when it was asked:

> "DO YOU FIND THAT PLAINTIFF HAS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT ANY ACCOMMODATION HE [PLAINTIFF] SOUGHT WOULD HAVE ENABLED HIM TO PERFORM THE ESSENTIAL FUNCTIONS OF THE COMBINATION MAN OR DOCK WORKER JOB, AND THAT ANY SUCH ACCOMMODATION WAS REASONABLE?"

JA 1449.

hid Mr. Taylor's medical evidence from its own doctor for more than a year,[7] and refused to permit him to work on the dock even after he had been fully released to operate *both* a fork lift *and* a truck.[8] Indeed, Red Star refused to consider Mr. Taylor's return to return to work in any capacity until he could do so without *any* restrictions whatsoever.[9] *C.f.*, 42 U.S.C. §12119(9); 12112(b)(5)(A) (requiring employers to provide accommodations to qualified persons with disabilities unless such accommodations would produce "undue hardship").

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[7] JA487-493.

[8] JA 1638; 1641; 1650.

[9] JA174; 183; 311; 326; 351; 382-89; 425; 877-78; 880;993."Full-duty" release requirements such as the one Red Star used here to deny employment to Mr. Taylor violate the ADA, as every federal court to address the issue has confirmed, because they do not allow a case-by-case assessment of an individual's ability to perform essential functions of the individual's job, with or without accommodation. *See e.g., EEOC v. Yellow Freight,* 2002 U.S. Dist. LEXIS 16826 (2002)(collecting cases). *Accord Henderson v. Ardco,* 247 F.3d 645, 653 (6th Cir. 2001*)*; *McGregor v. National R.R. Passenger Corp.,* 187 F.3d 1113, 1116 (9th Cir. 1999) (collecting cases). *Hendricks-Robinson v. Excel Corp.,* 154 F.3d 685, 699 (7th Cir. 1998); *Weigel v. Target Stores,* 122 F.3d 461, 466 (7th Cir. 1997); *Hutchinson v. United Parcel Serv., Inc.,* 883 F. Supp. 379, 397 (N.D. Iowa 1995); *Warmsley v. MTA-NYCTA,* 308 F. Supp. 2d 114 (E.D.N.Y. 2004); *Norris v. Allied-Sysco Food Servs., Inc.,* 948 F. Supp. 1418, 1437 (N.D. Cal. 1996), *aff'd* 191 F.3d 1043 (9th Cir. 1999), *cert. denied,* 528 U.S. 1182 (2000); *Heise v. Genuine Parts Co.,* 900 F. Supp. 1137, 1154 & n.10 (D. Minn. 1995); *Sarsycki v. United Parcel Service,* 862 F., Supp. 336, 341 (W.D. Okla. 1994).

Red Star's actions were premised upon its exaggerated and intractable misconceptions as to the nature and severity of Mr. Taylor's isolated seizures and its unfounded assumptions that he had epilepsy which was so "severe" and "uncontrolled" and that he "could have a seizure at any moment." JA30; 271; 279; 332; 409; 563; 566; 729; 860; 883; 891; 1612; 1669. Although Red Star contended that its misconceptions concerning Mr. Taylor's seizures and their functional impact were due to misrepresentations Mr. Taylor made to the company, the jury specifically found to the contrary.[10] Indeed, the jury accepted the plethora of record evidence that Red Star's erroneous assumptions regarding Mr. Taylor's medical condition derived from its own disregard of objective medical evidence, and its unreasonable reliance on the opinion of a company doctor who never saw Mr. Taylor and who, by his own admission, was not competent to evaluate

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[10] The jury answered *"NO"* to the following query:

> "DO YOU FIND THAT THE DEFENDANT HAS PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT PLAINTIFF MISINFORMED DEFENDANT ABOUT HIS MEDICAL CONDITION, AND THAT THE DEFENDANT EVALUATED THE IMPAIRMENT AND MADE AN INFORMED JUDGMENT BASED ON RELIABLE MEDICAL EVIDENCE AS TO HOW, IF AT ALL, THE IMPAIRMENT WOULD IMPACT THE PLAINTIFF'S JOB?"

JA1448. Thus, Red Star is estopped from arguing here that Mr. Taylor "perjured" his EEOC charge and otherwise misled Red Star as to the true nature of his medical condition.

the medical evidence in any event. JA487; 509.[11] Red Star admitted, in fact, that its position was fixed "regardless of what current medical evidence shows. JA1669. Indeed, Red Star vowed not to allow Mr. Taylor back to work until a federal judge forced it to do so. JA00164; 239; 411; 908; 981.[12]

REASONS FOR DENYING THE WRIT

A. Based on This Court's Opinion In *Toyota v. Williams*, Red Star Requested the Jury Instruction The District Court Gave as to What Constitutes a Major Life Activity Under the ADA; That Instruction Was Fully In Accord with *Williams* and was Properly Affirmed By the Third Circuit

Red Star never asked the District Court to instruct the

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[11] JA311; 326; 351; 382-89; 425; and 1001.

[12] The Jury said "*NO*" to the following question:

> "DO YOU FIND THAT THE DEFENDANT TOOK ITS ACTIONS TOWARD MR. TAYLOR ONLY AFTER IT WAS WELL INFORMED IN THE LIGHT OF CURRENT OBJECTIVE MEDICAL KNOWLEDGE CONCERNING THE MEDICALLY ACCURATE NATUREE OF THE RISK, THE DURATION OF THE RISK, THE SEVERITY OF THE RISK, AND THE PROBABILITIES THAT THE DISABILITY WILL CAUSE HARM?

JA1448.

jury that major life activities under the ADA are those activities which are of "central importance" to a person's daily life. In fact, the District Court gave the *exact instruction* Red Star *requested.*[13] Curiously, Red Star's authority for its proposed charge was *Toyota Manufacturing Co. v. Williams,* 534 U.S. 184, 197 (2002), the same case it now insists the District Court misapplied in charging the jury.

The Court's instruction on its face belies Red Star's complaint that the jury was led to conclude that activities which are *not* central to a person's daily life might qualify as "major" life activities for purposes of determining coverage under the ADA, and the Third Circuit properly affirmed it.[14]

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[13] Charge Number Nine of Defendant's Second Revised Proposed Points for Charge, October 6, 2004, Docket No. 66 at 11 (JA 1915).

[14] Red Star simplistic attack on the District Court's instruction regarding what constitutes a "major life activity" under the ADA is based upon a single phrase of the total instruction taken out of context. For the sake of clarity, the Court explained the concepts "major life activity" and "substantially limits" separately as follows:

> *Now the phrase "major life activity" means an activity that an average person can perform with little or no difficulty. Examples are caring for one's self, walking, breathing, seeing, hearing, and working. Mr. Taylor claims that USF-Red Star perceived him as having epilepsy or a seizure disorder, which substantially limited his major life activities of walking, breathing, caring for himself, remaining conscious and/or working and that it so classified him without a factual foundation.*
>
> *Now merely driving a forklift or truck is not a major life activity.*

To find that USF-Red Star regarded Mr. Taylor as having a impairment, which substantially limited the major life activity of working, Plaintiff must prove that USF-Red Star believed that Mr. Taylor had an impairment which restricted his ability to perform either a class of jobs or a broad range of jobs in various classes, as compared to the average person, having comparable training, skills and abilities. The inability to perform one type of job, a specialized job, or a particular job of one's choice, does not necessarily mean that one is substantially limited in the major life activity of working.

Now the phrase "substantially limits" means that Mr. Taylor was misclassified as, or was regarded as, being unable to perform one or more major life activities or significantly restricted as to the condition, manner, or duration under which he could perform at least one major life activity. The following factors are relevant in determining whether an individual is substantially limited in a major life activity: First, the perception of the nature and severity of the impairment; secondly, the perception of the duration or expected duration of the impairment; and three, the perception that the impairment would have a permanent or long term impact.

JA 1416. The Court went to explain:

Now merely driving a forklift or truck is not a major life activity. To find that USF-Red Star regarded Mr. Taylor as having a impairment, which substantially limited the major life activity of working, Plaintiff must prove that USF-Red Star believed that Mr. Taylor had an impairment which restricted his ability to perform either a class of jobs or a broad range of jobs in various classes, as compared to the average person, having comparable training, skills and abilities. The inability to perform one type of job, a specialized job, or a particular job of one's choice, does not necessarily mean that one is substantially limited in the major life activity of working.

Now the phrase "substantially limits" means that Mr. Taylor

Indeed, the jury questionnaire asked only whether Mr. Taylor had proved by a preponderance of the evidence whether Red Star perceived him as substantially limited in "*the* major life activities of *walking, breathing, caring for himself, remaining conscious, and/or working in either a class of jobs or a or a broad range of jobs in various classes*". By any definition of the term, the life activities the District Court specifically asked the jury to consider constitute "major life activities" to which the ADA is indisputably directed.[15]

> *was misclassified as, or was regarded as, being unable to perform one or more major life activities or significantly restricted as to the condition, manner, or duration under which he could perform at least one major life activity. The following factors are relevant in determining whether an individual is substantially limited in a major life activity: First, the perception of the nature and severity of the impairment; secondly, the perception of the duration or expected duration of the impairment; and three, the perception that the impairment would have a permanent or long term impact.*

JA1417. Red Star does not accuse the District Court of incorrectly defining the term "substantially limits."

[15] Red Star misperceives what was at issue in *Toyota* and the limited scope of this Court's holding. The *only* issue the Court addressed was whether the plaintiff had adduced sufficient evidence that she was *actually* and substantially limited in the major life activity of *performing manual tasks*. As to *that* major life activity, the impairment must prevent or severely restrict the plaintiff from performing manual tasks which are central to most people's daily lives. 534 U.S. at 195. The Court never said or suggested that this is the standard for ascertaining whether an impairment substantially limits any other major life activity. As numerous Circuit Courts have recognized, the indicia of importance to everyday life which the Supreme Court considered in connection with Ms. Williams' claim that she was substantially limited in performing manual tasks would be of little relevance in analyzing other major life

Thus, contrary to Red Star's complaints, the Third Circuit has not endorsed a "new definition" of what constitutes a major life activity for purposes of the ADA. If anything, the District Court's definition was overly restrictive, as one may qualify as having a substantial limitation in a major life activity even if the activity impacted by the disability is not one of those the Court enumerated. 29 C.F.R. § 1630.2(i).

Even if the District Court did err by omitting the phrase "central to most people's daily lives" from its instruction as to what constitutes a major life activity, the error was harmless. Red Star, after all, invited the same instruction that the District Court gave. Moreover, all of the examples that the District Court provided the jury as to what constitutes major life activities *are* central to most people's daily lives. The Court's instruction left no room for the jury to conclude that it was free to find liability based on activities other than the five it identified, and there is no evidence that it did.[16]

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activities. *See eg., EEOC v. Sears & Roebuck Co., Inc.*, 417 F.3d 789 (7th Cir. 2005). As to the major life activity of performing manual tasks, the Third Circuit has required plaintiff to prove substantial limitation as to activities of central importance to most people's daily lives. *Emory v. Astra-Zeneca Pharmaceuticals LP*, 401 F.3d 174, 181 (3d Cir. 2005).

16 Additionally, the evidence at trial demonstrated overwhelmingly that Red Star's perception of Mr. Taylor's condition was significantly more restrictive than it had to be to bring him within the coverage of the ADA. Red Star admitted that it perceived Mr. Taylor to be incapable of walking, breathing, caring for himself, and remaining conscious during a seizure, and it feared that this could occur at unpredictable intervals. Unrebutted testimony from Mr. Taylor's vocational expert established that Red Star's perceptions of Mr. Taylor's condition, if true, would not

B. There Is No "Circuit Split" As To What Proof An ADA Plaintiff Must Adduce To Prove An Actual vs. A Perceived Disability

Nothing in the opinion below creates a "Circuit split" as to the standard of proof for "regarded as" plaintiffs. The Third Circuit has never, in this or any other case, stated or implied that an ADA plaintiff can claim coverage under the perception prong of the Act without proving that the employer regards him as having a disability which substantially limits one or more major life activities. *E.g., Tice v. Centre Area Transportation Authority,* 247 F.3d 506 (3rd Cir. 2001); *Taylor v. Pathmark, Stores, Inc.*, 177 F.3d 180 (3rd Cir. 1999); *Deane v. Pocono Medical Center,* 142 F.3d 138 (3rd Cir. 1998). There is simply no "Circuit split" to resolve.

Even if this Court were to re-iterate what the Courts of Appeal, including the Third Circuit, already agree unanimously to be the standard of proof for "regarded as" claims, the factual record here would command the same result which the Third Circuit affirmed below. Whether Red Star perceived Mr. Taylor as having a disability in one or more major life activities was a question of fact for the jury, and the evidence that it did so was overwhelming. Throughout the relevant time period, Red Star's managers

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only have significantly restricted his vocational opportunities, but would have virtually eliminated them altogether. JA563-573; 619; 677-79. Thus, even if the jury had been instructed to consider whether Red Star perceived Mr. Taylor to have a substantial limitation in a major life activity of central importance to most people's daily lives, the jury would still have concluded that the company regarded him as having a disability under the ADA.

insisted with absolute certainty (albeit absolutely erroneously) that Mr. Taylor was an "epileptic" who was "seizure prone" and subject to "sudden and unpredictable losses of consciousness." JA883; 1568. Without a shred of medical evidence, Red Star believed that Mr. Taylor had " an established history of epilepsy," ... an "epileptic (convulsive, loss of consciousness) condition ..... There is no disputing this basic medical fact." JA1581-2. Based on its unfounded assumptions regarding seizures and epilepsy, Red Star thought that Mr. Taylor could "have a seizure at any moment." JA309; 313. Red Star insisted that its erroneous and medically unsupported conclusion was "simple, irrefutable, inescapable, and undisputed." *Id.* "[A]ny sixth grader," according to Red Star, would see its point that Mr. Taylor was unqualified for any job in the company. JA 310; 883; 332; 886; 1669-74.[17]

The jury had more than an adequate factual basis to conclude that, if true, Red Star's perceptions would have substantially limited one or more of Mr. Taylor's major life activities. He would have been unable to go out of his home

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[17] Red Star's citations to cases in which Courts and juries conducted an individualized inquiry and concluded that the plaintiff did not have a disability are inapposite. Although a person with epilepsy or a seizure disorder may not be in a perpetual seizure state, a jury could still conclude that their major life activities are substantially limited, especially if their condition is so unstable that they "could have a seizure any moment." *See Ottig v. J.C. Penny,* 223 F.3d 704 (8th Cir. 2000) (plaintiff with epilepsy which is uncontrolled, episodic, and unpredictable, and who is entirely incapable of numerous major life activities when a seizure is underway, has a disability under the ADA, regardless of work restrictions); *EEOC v. Kinney Shoe Co.,* 917 F. Supp. 419, *aff'd,* 104 F.3d 683 (4th Cir.1997).

unattended, travel independently, care for his children, cross a street, or perform most other activities of daily life without supervision because the consequences of having a seizure "at any moment" might have placed him in harm's way without the ability to protect himself from serious danger or death.[18] Red Star admits that this was why it did not even investigate whether it could accommodate Mr. Taylor in a clerical job or other in a non-forklift capacity on the dock. JA192-3; 331-32; 341; 675; 880; 917; 1632. *See also* Memorandum and Order dated March 8, 2005, App. 23, 28.

The Third Circuit, like the jury, had this and far more, to support its conclusion that Red Star's erroneous perception of Mr. Taylor's medical condition fell within the parameters of the ADA. Red Star fails to mention in its Petition that the jury had voluminous evidence, including *unrebutted expert testimony*, that if Mr. Taylor's condition was as unstable and as random as Red Star thought it was, (however erroneously), he would have been disqualified from several classes of jobs as well as numerous jobs in various classes." 29 C.F.R. § 1630.2(j)(3)(i); *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *see also* JA563-573; 677-8. Red Star's Brief does not even acknowledge the existence of this expert testimony, let alone explain why it does not render this Petition utterly frivolous.

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[18] Persons with epilepsy who are impaired at this level equal or exceed the requirements of the Social Security Administration for Disability Insurance Benefits. *See* SSR-87-6: Titles II and XVI: The Role of Prescribed Treatment in the Evaluation of Epilepsy; 42 C.F.R. § 404.1525-30 Appendix 1, (2002).

The expert's opinion that Red Star's perceptions significantly impeded Mr. Taylor's vocational opportunities, or eliminated them altogether, provided the jury with a solid evidentiary basis to conclude that Red Star regarded him as substantially limited in the major life activity of working, at the very least. According to the expert, if it were true that Mr. Taylor's seizure condition was so random that he could "have a seizure any minute", this would mean *total vocational disability* for Mr. Taylor. JA573. Even if Red Star only perceived that Mr. Taylor could not operate a fork lift or drive a truck, the vocational impact would have been devastating: it would have rendered Mr. Taylor ineligible for practically every job for which he was ever qualified by training and experience, including the entire class of truck driving jobs, all jobs involving material handling or movement, dock working, production jobs, and all jobs that require the ability to operate and control equipment, whether or not it moves or is stationary. JA563-567.

Although the jury was not compelled to accept this evidence, it had more than a sufficient basis to conclude that Red Star regarded Mr. Taylor as having a disability in one or more of his major life activities. The Third Circuit required Mr. Taylor to meet the evidentiary threshold which the ADA clearly directs, and concluded, based on the factual record before it, that he did so. There is no reason for this Court to burden itself with an academic exercise in which the conclusion is foreordained and undisputed by the Courts of Appeal and ADA litigants on both sides of the bar.

C. The Jury Found That Mr. Taylor Was Not Responsible for Red Star's False Perception Of His Medical Condition, and There Is No Factual Predicate For A Limited Reasonability Defense

Red Star seeks this Court's imprimatur for a complete defense under the ADA when an employer reasonably but mistakenly believes an employee to be disabled and denies him employment on that basis. Ironically, the Third Circuit has adopted a "limited reasonability defense" which provides relief for employers who erroneously regard an employee as having a disability if they rely on misinformation provided by the employee. *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 192 (3rd Cir. 1999). Mr. Taylor does not challenge the legitimacy of this doctrine.

Red Star seeks this Court's intervention in what it claims to be a "pairing [sic] back of the reasonable mistake defense." Petition at 21. A Circuit Court's departure from its own precedent is not a basis for a petition for certiorari to this Court. Even if it were, the Third Circuit in no way indicated that its support of the limited reasonability defense was on the wane. It merely acknowledged the obvious, that the jury had an adequate factual basis for concluding that Red Star, not Mr. Taylor, was responsible for its own false perceptions. App. 12, *citing, Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 150-51 (2000).[19] It could hardly have

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[19] *See also* Memorandum and Order dated March 8, 2005, App. at 28: "There was conflicting evidence on this issue and the jury clearly

done otherwise when Red Star's own witnesses admitted adhering to their baseless perceptions "regardless of what current medical evidence shows." JA1669. There is no reason for this Court to consider the parameters of a limited reasonability defense where, as here, there is no factual predicate to which it could be applied. The jury weighed and rejected the claim that Mr. Taylor misled Red Star into a false understanding as to the nature and extent of his medical condition. JA1448.

Red Star's perseverative effort to create yet another "Circuit split" is devoid of any support whatsoever. Even if a single unprecedential opinion from a Court of Appeals could create a "split" with another Circuit that merits this Court's attention, there is no such thing here. Neither of the cases Red Star cites from the Eighth Circuit, *Breitkruetz v. Cambrex Charles City, Inc.*, 450 F.3d 780 (8th Cir. 2006) and *Pittari v. American Eagle Airlines, Inc.*, 468 F.3d 1056 (8th Cir. 2006), is remotely similar to this one.[20] Nothing in either of those cases suggests that an employer's reliance on medical advice provides a defense to an ADA claim if that reliance is unreasonable, or is otherwise inconsistent with current, objective, and reliable medical evidence.[21] In stark contrast to

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resolved the conflict in favor of the Plaintiff."

[20] The fact that the Third Circuit found *Pittari* to be factually inapposite does not create a legal split between the Third and the Eighth Circuits. App. 6 n.1

[21] *Cf. Bragdon v. Abbot*, 524 U.S. 624, 650 (1999)(emphasizing that "courts should assess the objective reasonableness of health care professionals without deferring to their individual judgments"). *See also*

what happened here, the employers in *Pittari* and *Breitkruetz* based their decisions upon objective medical evidence which derived from an *actual examination of the plaintiff*.[22] Red Star, however, relied on the medical advice of a company doctor who never set eyes on Mr. Taylor until the day he testified in federal court, and from whom Red Star's management hid objective medical evidence as to Mr. Taylor's actual condition for more than a year.

The Courts of Appeals, including the Third Circuit, agree that the ADA provides no defense to an employer who deprives employment to an individual based upon its own disregard for objective medical evidence, and who "slavishly defers" to the opinion of a doctor who has never seen the plaintiff or who otherwise does not have all the facts. *Gillen v. Fallon Ambulance Services, Inc.*, 283 F.3d 11, 31 (1st Cir.

H.R. Rep. No. 101-485 (II) at 73, 1990 U.S.C.C.A.N. at 356 ("any determination by a company physician can be challenged by evidence from the complainant's physician. Company doctors are often unfamiliar with disabilities and assume that there are barriers to employment which in fact do not exist")

22 The recent Seventh Circuit decision in *EEOC v. Schneider National Inc.*, No. 06-3108, 2007 U.S. App. LEXIS 654 (7th Cir., March 21, 2007) is no different. There, the Court determined that the employer's decision to terminate the plaintiff due to the potential impact of his "neurocardiogenic syncope" was based on objective medical evidence. Contrary to what Red Star did here, the employer did not base its decision on an "unexaggerated" assessment as to the nature of the impairment, and its perceptions as to how the impairment impacted the plaintiff would not have (if true) substantially limited any major life activity. The company regarded the plaintiff as being unfit for a single, specific job and no more.

2002). *Accord Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 309 (3rd Cir. 1999) (employer does not reasonably rely upon a medical expert opinion based on a single office visit several years after the employment decision); *Holiday v. City of Chattanooga,* 206 F.3d 637, 645 (6th Cir. 2000)("[c]ourts need not defer to an individual doctor's opinion that is neither based on the individualized inquiry mandated by the ADA nor supported by objective scientific and medical evidence"); *Best v. Shell Oil Co.,* 107 F.3d 544 (7th Cir. 1997)(employer faces liability for relying on its unsupported doctor's report); *Reimer v. Illinois DOT,* 148 F.3d 800 (7th Cir. 1998)(same); *Ollie v. Titan Tire Corp.,* 336 F.3d 680 (8th Cir. 2003)(employer is not permitted to rely on its own misinterpretation of a physician's opinion regarding the individual's ability to perform the job at issue); *Lowe v. Alabama Power Co.,* 244 F.3d 1305, 1308 (11th Cir. 2001)(employer may not rely on inadequate doctor's evaluation to establish that plaintiff posed a direct threat). Any other construction would eviscerate the ADA and allow myths, fears, and stereotypes to deprive qualified people with disabilities of much needed employment opportunities.[23]

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[23] This would undermine Congress's specific intent in passing the ADA. Congress specifically found that:

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. 12101 (9). It was exactly because employers like Red Star have historically denied jobs to people with disabilities on the ground that something might happen, whether or not it has a medical basis to support

D. The Third Circuit Correctly Affirmed The District Court's Direct Evidence Jury Instruction That Red Star's Adverse Action Against Mr. Taylor Was Based on His Medical Condition, But That Red Star Did Not Believe That Mr. Taylor was Qualified

Red Star asked the Third Circuit to order a new trial because the District Court instructed the jury as follows:

> "The parties agree that USF-Red Star's decision to keep Mr. Taylor off the job between March 15, 2001 and October 21, 2002, is because of his seizures. Therefore you need not decide whether USF-Red Star prevented Mr. Taylor from returning to work because of his medical condition. There is no dispute as to this fact."

JA 1412. However, the District Court also instructed the jury that Red Star

> "denies that it regarded Mr. Taylor as having a disability as defined by the ADA and PHRA, and further denies that it misclassified him as such. USF-Red Star also denies that it discriminated against Mr. Taylor when it refused to allow him to return to work. USF-Red Star contends that Mr. Taylor was not

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its assumption that such risk is real, that Congress set forth a "direct threat" defense in the ADA. Congress specifically required employers attempting to preclude a person with a disability from working to prove more than the possibility that something untoward might happen. 42 U.S.C. § 12111 (3). Red Star, of course, never raised the direct threat defense and the Third Circuit did not consider it.

qualified to perform his job. JA1411.[24]

Under the guise of its complaint about this single jury instruction Red Star seeks Supreme Court review of issues which it never raised and which the Third Circuit did not consider. Red Star's attack on the Court's jury instruction is out of context, and assumes facts which find no support in the record.

First, Red Star's purported concern that the District Court's instruction, if applied broadly by other courts, would "eliminate" the "direct threat" defense" for other employers, amounts to a request for an advisory opinion. Petition at 23.

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[24] Furthermore, the Court instructed the jury that "there is a dispute about whether Mr. Taylor had a disability ... and whether [he] was qualified to perform the essential functions of the position he desired. JA103

[25] Although Red Star provides the text of the direct threat defense in its Petition under "Statutory Provisions Involved," it did not cite it even once in its Brief to the Third Circuit. As the District Court pointed out, Red Star failed to raise its "business necessity" defense in its Rule 50 Motion and thereby waived it. See App. 26. Furthermore, Red Star's attack on the jury instruction is a thinly veiled attempt to resurrect the question whether operating a fork lift was an essential function of the dock worker position to which Mr. Taylor requested to return. Petition at 23. Red Star did not preserve that issue either.

Red Star did not raise that defense at trial and certainly never preserved in its appeal to the Third Circuit. 42 U.S.C. § 12113 (b).[25]

Second, as in every ADA case, the question before the Third Circuit was intensely factual: did the District Court's instruction, taken as a whole, clearly present the issues to the jury? The Third Circuit's conclusion that it did so was record-based and has no policy implications whatsoever for future ADA litigation. App. 6.

Red Star charges that the District Court's instruction and the Third Circuit's affirmance thereof is a matter of national moment because, according to Red Star, it prevented Mr. Taylor from returning to work only because "the doctors had not cleared him to operate a fork lift." There has never been any dispute, however, that Red Star demanded a unrestricted *medical* release from Mr. Taylor because of his *medical* condition and for no other reason. JA 8.[26] Likewise, it is undisputed that but for the seizures, there would have been no adverse action here and no lawsuit.[27] Moreover, before the Third Circuit Red Star complained that it refused to permit Mr. Taylor to return because he was not cleared to "return to work" and that he was not cleared to operate "a truck *or* a forklift." Appellant's Brief to the Third Circuit at 27-28. There has never been any dispute that driving a truck is entirely irrelevant

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[26] JA8; 1592-3; 1600-6; 1664-5; 1676-80; 1703.

[27] *See* Memorandum and Order dated March 8, 2005, App. 29.

to whether Mr. Taylor was qualified to work on the dock at Red Star. Red Star's new and improved complaint, that it only deprived Mr. Taylor of his employment because he was not released to operate a fork lift, was not properly preserved.

The District Court gave the best and most neutral instruction which it was possible to give without siding with either party as to whether operating a fork lift or a truck was an essential function of the job which Mr. Taylor desired. Because there was disputed evidence as to whether operating a fork lift was an essential function of a dock worker, it would have been error for the District Court to have assumed that fact in its instruction to the jury. Additionally, Red Star indisputably rejected Mr. Taylor's request to return to work in any capacity whatsoever *even after* he had been fully released to operate *both* a fork lift *and* a truck, as well as numerous medical releases from Mr. Taylor which indicated that it was safe for him to handle manual freight on the loading dock, all because Red Star wanted an *unrestricted* medical release which would "resolve all the issues." JA345-46; 359; 494-96.[28]

The Third Circuit found that the instruction was fully adequate to fairly present the issue to the jury based on the record, and that decision should be affirmed. It would have been highly improper for the Court to have informed the jury that Red Star only kept Mr. Taylor off the job because he did

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[28] This is a direct evidence case precisely because there was never any question that Mr. Taylor's physical condition was the basis for the employer's action. Red Star, in fact, never even requested a pretext instruction. Red Star's highest management officials acknowledged that Mr. Taylor continued to sit at home solely because Mr. Taylor "presented information which documented he had the seizures." JA456.

not have a release to return to the job he held or desired, when Red Star's own witnesses testified to the contrary. Moreover, the District Court twice informed the jury that Red Star believed that Mr. Taylor "was not qualified to perform his job". Thus, the Court's instruction could not have prejudiced Red Star.

E. There Is No Circuit Split Between The Third Circuit And The Second As to the Application of F.R.C.P. 52

Red Star's attack on the Third Circuit's treatment of Mr. Taylor's Motion for Supplemental attorneys fees is entirely frivolous. Red Star filed an untimely objection to the Plaintiff's Motion.[29] Thus, it has no standing to challenge the disposition of that motion here, just as it had no standing to challenge it before the Third Circuit.

Notwithstanding Red Star's ironic procedural posture, its Petition flagrantly omits any mention of the critical and dispositive time line which governs the outcome of this issue. Mr. Taylor's supplemental fee motion was filed on April 20, 2005 to recoup the fees and costs he incurred during the litigation of his original fee motion. The District Court did not issue a final order regarding Plaintiff's original fee motion until

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[29] Plaintiff's Motion for Supplemental Fees was filed on April 20, 2005. Red Star did not respond until May 20, 2005, 16 days late. The District Court acknowledged that Red Star's response to Plaintiff's Motion was untimely, but decided the motion against Red Star because it was inconsistent with "common sense."

April 27, 2005. App.51.[30] Thus, the only reason that Mr. Taylor's supplemental fee motion was not filed within 14 days of "any order" is because it was filed seven days *before* the applicable order was issued. As the District Court aptly observed, this rendered Red Star's objections "groundless":

> How could Plaintiff submit a bill for the time spent preparing his fee petition before he completed its preparation and found out that it had been granted?

Id.

Moreover, the purported "Circuit split" Red Star attempts to construct from the Third Circuit's disposition of this case in comparison with the Second Circuit's decisions in *Weyant v. Okst,* 198 F.3d 311, 315 (2d Cir. 1999) and *Tancredi v. Metro Life Ins. Co,* 378 F.3d 220, 227-28 (2d Cir. 2004), *cert. denied,* 539 U.S. 942 (2003), causes one to suspect that its counsel has not read either case. The Third Circuit's treatment of the supplemental fees issue is entirely consistent with the Second Circuit's analysis in both *Weyant* and *Tancredi.* In *Weyant,* the Second Circuit explained that the fourteen day filing period for fee petitions, supplemental or otherwise, is not triggered until a final judgment has been rendered as to the proceedings in which the fees were incurred. *Accord Tancredi,* (plaintiff filed his initial fee petition twenty-one days after the

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30 The District Court's June 8, 2005 Order is located in the Appendix to Red Star's Petition at 51-52. On March 8, 2005 the District Court issued a partial ruling as to the plaintiff's motion for attorneys fees, but withheld judgment as to portions of the fee request and solicited further documentation and briefing from the parties. Memorandum and order March 8, 2005, App. 44.

entry of judgment (7 days late) without excuse).[31] Here, the decision which ultimately determined the outcome of Mr. Taylor's fee motion was not issued until after he had filed his motion for supplemental fees. Like Red Star's other imaginary "Circuit splits", therefore, this one derives from cases with distinguishable facts but no dispute regarding governing legal principles.

Finally, even if there were any basis for Red Star's assertion that Mr. Taylor filed his motion for supplemental fees out of time, the District Court acknowledged that he did so within the time period the Court itself implied. App. 51-52; JA31.[32] Rule 54 (d)(2) specifically provides that fee motions may be filed after fourteen days from an order if "order[ed] by the court." The Third Circuit's decision does nothing more than acknowledge that Rule 54 specifically grants the District Courts the discretion to control the post-trial process so as to avoid piecemeal litigation. *Weyant,* 198 F.3d at 315.

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[31] To evidence a "Circuit Split," Red Star also points to a recent, albeit unpublished, opinion of the Third Circuit, *Bernback v. Greco,* No. 05-4642, 2007 WL 108293 (3rd Cir. Jan. 16 2007). That case is entirely consistent with both *Weyant, Tancredi,* and the decision below. Indeed, the Third Circuit *followed Weyant* in that case. Id. at *7.

[32] Because the District Court, by its own admission, led Plaintiff's counsel to believe that he should file his motion for supplemental fees after the Court fully disposed of the original fee motion, any neglect would have been "excusable" pursuant to F.R.C.P. 54(d)(2).

CONCLUSION

For all the foregoing reasons, Red Star's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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34

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No. 06-1284

Supreme Court, U.S.
FILED
MAY 2 - 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

USF-RED STAR EXPRESS, INC.,

Petitioner,

v.

EDWIN B. TAYLOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	ARGUMENT	2
	A. Taylor's Lengthy Factual Recitation Is Largely Irrelevant And Mischaracterizes The Record	2
	B. The Third Circuit's Decision Conflicts With A Seventh Circuit Opinion Decided Under Nearly Identical Facts	3
	C. The Third Circuit's Decision Conflicts With An Indistinguishable Eighth Circuit Decision	6
	D. Taylor's Argument Regarding The District Court's Definition Of "Major Life Activities" Underscores Why Certiorari Should Be Granted	7
	E. The Third Circuit's Decision Effectively Eliminates A Statutory Defense And Conflicts With Other Circuit Precedent	8
	F. Certiorari Should Be Granted To Resolve The Conflict Between The Second And Third Circuits' Interpretations Of Rule 54(d)(2)(B)	10

TABLE OF AUTHORITIES

Page

CASES

Caballero v. City of Concord, 956 F.2d 204 (9th Cir. 1992) 3, 4

Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999) 5

Pittari v. Am. Eagle Airlines, Inc., 468 F.3d 1056 (8th Cir. 2006) 6, 7

EEOC v. Schneider Nat'l, Inc., __ F.3d __, 2007 WL 841035 (7th Cir. Mar. 21, 2007) 3, 5

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 4

Toyota Motor Mfg. Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) 8

Weyant v. Okst, 198 F.3d 311 (2d Cir. 1999) 10

FEDERAL STATUTES

20 C.F.R. § 404.1525 at §§ 11.02, 11.03 5

RULES

Fed. R. Civ. P. 54(d)(2)(B) 10

I. INTRODUCTION

This case, and the other Circuit cases with which it conflicts, literally involve public safety on the nation's highways and potentially life-threatening situations where workers operate heavy duty forklifts at relatively high speeds to move tons of freight.[1] It warrants this Court's consideration.

Taylor's response (the "Response") to Red Star's Petition for Writ of Certiorari (the "Petition") focuses almost exclusively on the merits of the Third Circuit's decision below, and not on whether this case is worthy of certiorari.[2] Specifically, Taylor ignores that various aspects of the Third Circuit's decision conflict with this Court's precedent and with decisions of the Second, Seventh, and Eighth Circuits. Taylor glosses over the fact that the Third Circuit's decision is exactly contrary to recent decisions of the Seventh and Eighth Circuits handed down under extremely similar facts.

Taylor's merits-based arguments, moreover, do not provide any reason to deny certiorari. Taylor argues that the same decisions would have been reached even if the Third Circuit had applied the appropriate standards (*e.g.*, because the errors in the jury charge were harmless). Taylor's merits arguments are deeply flawed. More importantly, however, Taylor misunderstands this Court's role and that his arguments are irrelevant to any issue that will be before the Court. Taylor's arguments do not relate to any of the Questions Presented in the Petition, and Taylor did not cross-petition for

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[1] Every relevant witness agreed, driving a forklift can be hazardous. (JA0216-220 (9/30/04 Tr. 135:16-139:7); JA0612-618 (10/5/04 Tr. 65:18-71:4); JA0892 (10/6/04 Tr. 79:4-17); JA0900 (10/6/04 Tr. 87:10-20); JA01063-64 (10/6/04 Tr. 250:24-251:8); *see also* JA1500-1559 (D-92 – D-98) (government publications regulating forklifts because of inherent dangers, explicating dangers of working on or around forklifts, and tracking forklift injuries and deaths).)

[2] Taylor emphasizes that the Third Circuit's opinion was marked "Not Precedential." (Resp. at 1-2.) This, however, cannot insulate the decision from review by this Court and does not eliminate the conflicts with this Court's precedent and with other Circuit decisions detailed in the Petition.

review of these issues. It is the lower courts, therefore, and not this Court, that will decide these questions in the first instance if the Court grants certiorari and reverses. Thus, for the reasons set forth below and in the Petition, Red Star respectfully requests that the Court grant its Petition for Writ of Certiorari.

II. ARGUMENT

A. Taylor's Lengthy Factual Recitation Is Largely Irrelevant And Mischaracterizes The Record.

Taylor spends a great deal of time outlining facts that are allegedly supported by the record and relevant to this Court's decision on the Petition. (Resp. at 2-7.) Most of Taylor's discussion of the facts is irrelevant, however, and many of his allegations are completely unsupported by his record citations.

Taylor addresses facts related to whether driving a forklift was an "essential function" of his job and whether he could have performed the essential functions of the job with a "reasonable accommodation." (Resp. at 3-6.) These concepts, however, are distinct from the legal issues on which Red Star sought certiorari. (Pet. at i-ii). These facts, therefore, are irrelevant to this Petition.

Many of Taylor's allegations are also unsupported by the Record. For example, Taylor alleges that Red Star "affirmatively hid Mr. Taylor's medical evidence from its own doctor for more than a year" and that it "refused to permit him to work on the dock even after he had been fully released to operate *both* a fork lift *and* a truck." (Resp. at 5.) None of Taylor's record citations, however, support these accusations. Likewise, Taylor persistently argues that Red Star's position was fixed "regardless of what current medical evidence shows." (Resp. at 1, 7, 17.) Taylor's use of this inaccurate quote is grossly misleading. The quote is drawn from an email written by Red Star's president in response to Taylor's and the union's litigation position. A review of the email in context illustrates the absurdity of Taylor's characterization of the evidence. (JA01669 (P-57) ("We have neither the expertise nor the training to determine what caused Mr.

Taylor's seizures. . . . Do the medical experts now agree that Mr. Taylor has proven that he is no longer subject to seizures and that he no longer poses the risk, as a result of seizure(s) of inflicting injury or death upon himself or others?").) The Court should ignore Taylor's unsupported factual allegations and mischaracterizations of the evidence.[3]

B. The Third Circuit's Decision Conflicts With A Seventh Circuit Opinion Decided Under Nearly Identical Facts.

Red Star argued that certiorari should be granted because the Third Circuit's effective adoption of a new, more lenient standard to judge "regarded as" disability claims conflicted with this Court's and other Circuits' decisions. (Pet. at 15-19.) Taylor essentially ignores this argument and asserts that "[t]here is simply no 'Circuit split' to resolve." (Resp. at 12.) Taylor's bare denial, however, does not eliminate these conflicts. (Pet. at 15-19.) Indeed, the Third Circuit's decision conflicts directly with a Seventh Circuit case decided the same day the Petition was filed. *See EEOC v. Schneider Nat'l, Inc.*, __ F.3d __, No. 06-3108, 2007 WL 841035 (7th Cir. Mar. 21, 2007).

In *Schneider*, the Seventh Circuit addressed facts materially identical to those before the Third Circuit, but reached the opposite result. The plaintiff ("Hoefner") was a truck driver who was diagnosed with a condition that could cause him to faint. *Id.* at *1. Schneider's policy was not to employ anyone with this condition as a truck driver because it believed that the condition had caused a fatal accident involving one of its drivers. *Id.* Schneider fired Hoefner based on this policy, even though his condition was treatable and even though he was permitted to drive trucks under federal

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[3] Taylor argues that he is entitled to have factual disputes resolved in his favor. In reviewing "misleading or inadequate" jury instructions, however, "the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party." *Caballero v. City of Concord*, 956 F.2d 204, 207 (9th Cir. 1992).

law. *Id.* The EEOC then brought suit on his behalf alleging that Schneider had "regarded" Hoefner as disabled. *Id.* at *1.

Writing for a unanimous panel, Judge Posner rejected the EEOC's contentions. Unlike the Third Circuit, the Seventh Circuit correctly identified the standard applicable to "regarded as" disability claims:

> There usually and here are two issues to resolve in such a case. The first is whether the employer's decision to terminate or take some other adverse employment action against the employee was motivated by a mistaken belief that the condition precludes him from engaging in some activity. *If so, the second question is whether the activity that the employer mistakenly believes the employee to be disabled from engaging in is a "major life activit[y]."*

Id. at *1 (emphasis added). Based on this standard, the Seventh Circuit held that Schneider's refusal to accept the risk that Hoefner's condition *might* cause an accident did not establish that Schneider believed that he was disabled:

> Schneider is entitled to determine how much risk is too great for *it* to be willing to take. . . . The fact that another employer and, as in all such cases, the worker himself are willing to assume a risk does not compel the worker's current employer to do likewise.

Id. at *2 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999)).

The Seventh Circuit also rejected the EEOC's argument that the court should infer that Schneider "regarded" Hoefner as unable to drive "any type of truck for any type of trucking company," *i.e.* that he was substantially impaired in his ability to work. *Id.* at *3-4. The Seventh Circuit held that, even if:

> Schneider had exaggerated Hoefner's condition and mistakenly thought him disabled from a broad range of jobs even though he was not[,] . . . the EEOC would not have made its case, because Schneider's hypothetical admission would be consistent with the company's having decided to set a higher safety standard than law or custom

> requires. . . . As we know from *Sutton*, that is a decision the Act does not touch.

Id. at *5.

Schneider is directly contrary to the Third Circuit's opinion in this case. The Third Circuit ruled that evidence that Red Star was concerned for the risk that Taylor "*might* have another seizure and be a danger to the public" and "*could* be a threat to himself [and] others" demonstrated that Red Star believed Taylor was substantially impaired in a major life activity. (App. at 10 (emphasis added)). Under *Schneider*, however, this evidence would be insufficient to establish that Red Star regarded Taylor as disabled. This conflict between the Third and Seventh Circuits is another reason that this Court should grant certiorari.

Taylor also argues that he would have prevailed even if the Third Circuit had applied the appropriate standard. (Resp. at 12-15.) Taylor, however, mistakes this Court's function. If the Court grants certiorari and reverses, it will be the lower courts, and not this Court, that will decide in the first instance whether the evidence was sufficient to sustain the jury's verdict. Taylor's arguments, therefore, are both mistaken[4] and irrelevant to the certiorari question.

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[4] Taylor cites evidence that Red Star thought he was an epileptic, (Resp. at 13), but such evidence cannot prove a "regarded as" disability. (Pet. at 16.) Taylor asserts that Red Star believed he could not "go out of his home unattended," *etc.*, (Resp. at 13-14), yet, he does not cite any record evidence supporting this assertion and there is none. Taylor cites his expert's testimony, but ignores that the district court specifically excluded the use of the expert's testimony to prove Red Star's perception of Taylor. (JA00523 (10/4/04 Tr. 218:12-21).) Finally, Taylor cites the Social Security Administration's ("SSA") regulations for Disability Insurance Benefits. (Resp. at 14 n. 18.) These regulations are irrelevant here. *Cf. Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 804 (1999) (distinguishing disability under the SSA from the ADA). Further, there is no evidence that Red Star believed that Taylor had a disabling condition under the SSA regulations. *See* Appendix 1 to 20 C.F.R. § 404.1525 at §§ 11.02, 11.03, http://www.ssa.gov/OP_Home/cfr20/404/404-ap10.htm (epilepsy is disabling only when occurring more frequently than once a month (11.02) or once a week (11.03)).

C. The Third Circuit's Decision Conflicts With An Indistinguishable Eighth Circuit Decision.

Red Star argued that certiorari should be granted because the Third Circuit's resolution of Red Star's appeal regarding the reasonable mistake defense conflicted with the Eighth Circuit's jurisprudence addressing the relationship between medical evidence and "regarded as" disability claims. (Pet. at 19-22.) Taylor asserts that there is no circuit split, and then argues the merits of the Third Circuit's decision. (Resp. at 16-20.) Contrary to Taylor's argument, however, the Eighth Circuit's decisions are indistinguishable. Indeed, the facts in *Pittari v. American Eagle Airlines, Inc.*, 468 F.3d 1056 (8th Cir. 2006), bear an uncanny resemblance to those at issue here. Yet, the Third Circuit's decision is exactly opposite the Eight Circuit's.

In *Pittari*, the plaintiff ("Pittari") worked for the defendant ("American") as a flight attendant, a position the FAA classified as "safety sensitive." *Pittari*, 468 F.3d at 1058. American became concerned that Pittari's cognitive functions, and thus his ability to perform safety sensitive duties, might be impaired. *Id.* American, therefore, requested that a doctor examine Pittari. *Id.* The doctor found Pittari to be impaired, and American restricted Pittari from working as a flight attendant. *Id.* at 1059. At his request, Pittari was later retested by a new doctor. *Id.* The new doctor opined that Pittari could safely return to work, largely because he had performed the job in the past. *Id.* American was skeptical, however, and requested a copy of the new doctor's assessment of Pittari. *Id.* It concluded that the test results did not agree with the doctor's recommendation and refused to lift Pittari's work restrictions. *Id.* Pittari then requested a binding third-party medical evaluation. *Id.* This evaluation demonstrated that Pittari could perform his job safely, and American lifted Pittari's work restrictions. *Id.*

Pittari sued claiming that American had regarded him as disabled. *Id.* at 1059-60. A jury found for Pittari and American appealed. *Id.* at 1060. In granting American judgment as a matter of law, the Eighth Circuit reaffirmed

its precedent that work restrictions based on doctors' advice do not demonstrate a perception of disability:

> we repeatedly have recognized "the provision addressing perceived disabilities is intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities." *Restrictions based upon the recommendations of physicians are not based upon myths or stereotypes about the disabled and thus do not demonstrate a perception of disability.*

Id. at 1063 (emphasis added, citations omitted). Thus, the Eighth Circuit held that the defendant was insulated from liability for a "regarded as" disability claim even though it chose to follow its own doctor's recommendations and to question the plaintiff's doctor's recommendations until a third-party doctor opined that the plaintiff could safely perform his normal duties.

By contrast, the Third Circuit reached the opposite conclusion under materially identical facts.[5] Indeed, the Third Circuit ruled that Red Star lost its defense *because of* its reliance on the doctors' opinions. The Third Circuit rejected Red Star's defense that Taylor had promoted the misperception that he was an epileptic because: "there was evidence [that] Red Star's perception that Taylor had a serious epileptic condition . . . was not based on information from Taylor, *but on the assessments of doctors reporting to Red Star*." (App. at 12 (emphasis added).) Thus, the Court should also grant certiorari to resolve this conflict.

D. Taylor's Argument Regarding The District Court's Definition Of "Major Life Activities" Underscores Why Certiorari Should Be Granted.

Red Star argued that certiorari should be granted because the Third Circuit's endorsement of the definition of

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[5] For a discussion of the facts, *see* Red Star's Third Circuit Appeal Brief at 5-18.

"major life activities" as activities that "an average person can perform with little or no difficulty" conflicted with this Court's decision in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) and its progeny. (Pet. 13-15.)

Taylor responds that there is no conflict between the Third Circuit's decision and this Court's precedent because *Toyota* does not apply outside of cases involving the major life activity of performing manual tasks. (Resp. at 10 n. 15.) Taylor is mistaken. The Court's definition was based on the meaning of the word "major," which necessarily applies equally to all "*major* life activities." *See Toyota*, 534 U.S. at 197 ("'Major' in the phrase 'major life activities' means important. . . . 'Major life activities' thus refers to those activities that are of central importance to daily life.") Taylor's argument, moreover, highlights another reason certiorari should be granted. Like Taylor, the Third Circuit mistakenly believed that *Toyota* was limited to cases involving manual tasks. (App. at 8.) Indeed, Taylor suggests that "numerous Circuit Courts" have recognized that *Toyota* is so limited. (Resp. at 10 n. 15.) The Court should grant certiorari to clarify that *Toyota*'s definition applies to all purported "major life activities."

Taylor also argues that certiorari should be denied because any error was harmless. This argument is irrelevant.[6] Neither court below decided whether the challenged jury charges were harmless because they concluded that they were not erroneous. (App. 8-9, 29-30.) If this Court grants certiorari and reverses, therefore, it will be the lower courts, and not this Court, that will decide in the first instance whether the error was harmless.

E. The Third Circuit's Decision Effectively Eliminates A Statutory Defense And Conflicts With Other Circuit Precedent.

Red Star argued that certiorari should be granted because the Third Circuit's decision – that it was proper to

[6] Taylor's arguments are baseless. *See* Red Star's Third Circuit Appeal Brief at 24-28; Red Star's Third Circuit Response/Reply Brief at 4-9.

instruct the jury that there was no dispute that Red Star kept Taylor out of work "because of his medical condition," even though Red Star argued throughout trial that it kept Taylor off the job because the doctors had not cleared him to drive safely – effectively eliminated the direct threat defense and conflicted with other circuits' precedent. (Pet. at 22-25.) Taylor argues that certiorari should be denied for two reasons. (Resp. at 20-24.)

First, Taylor argues that the Petition seeks an advisory opinion because Red Star did not raise a direct threat defense. (*Id.* at 21.) Red Star, however, did not request this Court to provide any ruling on the direct threat defense. (Pet. i-ii.) Rather, Red Star cited the direct threat defense to highlight the public policy consequences of the Third Circuit's decision, which effectively limits the applicability of the defense, as a reason for this Court to grant certiorari. (*Id.* at 23-24.)

Second, rather than addressing Red Star's argument that the Third Circuit's decision created a circuit split, Taylor once again makes a merits argument, claiming that certiorari should be denied because the "question before the Third Circuit was intensely factual," and because "[t]he District Court gave the best and most neutral instruction which it was possible to give without siding with either party." (Resp. at 22-23.) As discussed above, Taylor's argument misunderstands this Court's function and is premature and irrelevant.[7]

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[7] Taylor is also wrong. The district court did not give the "most *neutral* instruction" possible. (Resp. at 22-23) (emphasis added). Its charge directed the jury to decide in Taylor's favor an issue that his lawyers characterized as "*the* issue in the case." (JA01251 (10/7/04 Tr. 174:7-12) (emphasis added); *see also* (JA01250-52 (10/7/04 Tr. 173:10-175:5) ("Those facts are in dispute."; "No, that is what the trial is about. I do not agree with it.")).) Nor was the question before the Third Circuit "intensely factual." All that was required was to determine: (1) whether the issue was disputed, and if so, (2) whether it was erroneous to instruct the jury to decide that issue in Taylor's favor. The first point can be decided from three pages of trial transcript, (JA01250-52 (10/7/04 Tr. 173:10-175:5)), and the second point is purely legal.

F. Certiorari Should Be Granted To Resolve The Conflict Between The Second And Third Circuits' Interpretations Of Rule 54(d)(2)(B).

Red Star demonstrated that the Third Circuit's construction of Rule 54(d)(2)(B) conflicts with the Second Circuit's interpretation. (Pet. at 25-26.) Taylor responds that there is no conflict between the Third and Second Circuits, and that the Third Circuit's decision was correct in any event.[8] (Resp. at 25-27.) Taylor is wrong.

The Third Circuit's decision conflicts with the Second Circuit's prior rulings. In the Second Circuit, *both* an initial fee motion *and* a supplemental fee motion must be filed within 14 days after a final judgment or the resolution of a motion that suspends the finality of the judgment. *Weyant v. Okst*, 198 F.3d 311, 315 (2d Cir. 1999). By contrast, although the Third Circuit recognized that an initial motion for fees must be filed within this time, it held that a supplemental fee petition is timely when "its timing [is] logical, despite the fact that it [is] filed more than fourteen days after any entry of judgment." (App. at 21.) These holdings are irreconcilable.[9]

Respectfully submitted,

Dated: May 2, 2007

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[8] Taylor argues that Red Star lacks standing to raise this issue, but Red Star clearly has standing to challenge the order requiring it to pay Taylor's attorneys' fees.

[9] Taylor's argument that his supplemental fee motion was timely is both irrelevant to this Petition and wrong. Taylor's motion was untimely because it was not filed within "14 days after entry of judgment." Fed. R. Civ. P. 54(d)(2)(B).